TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 365

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

vs.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,179)

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI.

No. 209164.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Defendant.

VERDICT AND JUDGMENT—May 31, 1928.

Again come the parties and the jury herein, and the hearing of the evidence is concluded and the said jury after being instructed by the Court and hearing the arguments of counsel for the respective parties retire for consideration of its verdict and after due deliberation, the said jury returns its verdict into open court which said verdict is in words and figures as follows, to-wit:

> "We the jury, find the issues for the plaintiff and do assess her damages at fifteen thousand dollars [$15,000.00].
>
> Stanley S. Stone,
> Foreman."

Wherefore, it is ordered and adjudged by the Court that plaintiff have and recover from the defendant the sum of fifteen thousand dollars [$15,000.00] with interest thereon from this day at the rate of six

per cent per annum together with the costs of the cause and that execution issue therefor.

[fol. 1-b]

IN THE CIRCUIT COURT OF JACKSON COUNTY.

[Title omitted]

ORDER ALLOWING APPEAL—July 7, 1928.

Defendant presents and files application and affidavit for an appeal from the judgment of this Court in this cause. Which said application is by the Court sustained and appeal allowed to the Supreme Court of Missouri.

Appeal bond fixed at the penal sum of [$31,000.00].

Defendant is given leave to file bill of exceptions until on or before the last day of the September, 1928 term of this Court. And now defendant presents and files its appeal bond herein in the penal sum of [$31,000.00] with Arthur J. Elliott and A. Newman as sureties thereon which said bond is by the Court approved.

Clerk's certificate to foregoing papers omitted in printing.

No. 29330.

IN THE

SUPREME COURT OF MISSOURI

DIVISION No. I.

APRIL TERM, 1930.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT.

APPEAL FROM CIRCUIT COURT OF JACKSON COUNTY, MISSOURI.

HONORABLE RALPH S. LATSHAW, JUDGE, DIVISION EIGHT.

APPELLANT'S ABSTRACT OF RECORD.

This suit was instituted in the Circuit Court of Jackson County, Missouri, at Kansas City, on November 3, 1924, by the filing of plaintiff's

petition; plaintiff thereafter and on January 21, 1927, filed her amended petition, on which the case was tried, as follows (caption and signature omitted):

Amended Petition.

Plaintiff for her cause of action states:

(1) James Lee David died on the 17th day of May, 1923, and thereafter plaintiff was by the Probate Court of Jackson County, State of Missouri, appointed administratrix of said David's estate; plaintiff has duly qualified as such administratrix and is now acting as such.

(2) The above named defendant at all times herein mentioned is and was a corporation and common carrier by railroad, engaged in commerce between the several states of the United States.

(3) Said David, while employed by the defendant in commerce between the several states of the United States, did at about 1:30 o'clock A. M., on May 17, 1923, suffer bodily injury, which injury on the same day caused said David's death, and plaintiff now brings this action to recover damages therefor, under the laws of the United States, being Act of Congress of April 22, 1908, 35 United States Statutes at Large, 65, as amended by Act of Congress, approved April 5, 1910, 35 Statutes at Large 291, and all other Acts of Congress dealing with the premises.

(4) Said injury was sustained by said David while said David was in the employ of the defendant as aforesaid, and resulted in whole or in part from the carelessness and negligence of the

defendant, its officers, agents and employees in this, to-wit:

That on said 17th day of May, 1923, and for a long time prior thereto the said James Lee David was employed by the defendant in connection with its commerce business between the several states of the United States as a train rider, whose duty it was to ride upon the trains of the defendant for the purpose of protecting its property and the property carried by it from damage and loss, and in general to watch over and guard the trains and property carried upon the trains of the defendant while in transit; that said David was assigned the duty by the defendant of riding its trains between the city of Kansas City in the State of Missouri, and the city of Atchison in the State of Kansas; that at some time prior to said 17th day of May, 1923, the defendant in its special agents or police department, negligently and wantonly employed a certain person as an informant who was known by the defendant at said time to be an ex-convict, a thief and robber, who consorted with thieves, robbers, murderers and other desperate persons, and the defendant instructed said informant to continue to consort with thieves, robbers, murderers and persons of desperate character and to learn of their plans and designs, especially with reference to theft or robbery of property of defendant or in its possession, and further instructed said informant that whenever he should learn of any proposed robbery or theft of or from the defendant, that said informant should report such fact to the defendant to the end that such

thieves or robbers might be interrupted and apprehended; that said informant entered upon said employment and was regularly paid by the defendant therefor; that at some time before the 17th day of May, 1923, the said informant, then in the employ of defendant, pursuant to his employment as aforesaid, consorted with certain desperate persons known to said informant to be thieves, robbers and murderers, and said persons informed said informant that they intended to rob a certain train of the defendant at Leavenworth, Kansas, in the early morning of said May 17, 1923; that said informant, the agent of defendant, accompanied said thieves and robbers to said Leavenworth, Kansas, well knowing the design and intent of said persons, and knowing that they were armed with firearms, and knowing that they were of such desperate character that they would take human life in order to accomplish their purpose or to protect themselves if interfered with, and knowing that train riders and train crew upon said train would be subjected to the hazard of an encounter with said desperate persons, and said informant went with said persons and said informant remained until the arrival of said certain train of the defendant, and upon the arrival of said train, said persons in the presence of said informant surrounded said train with intent to rob the same; that said train had come to said Leavenworth, Kansas, from Kansas City, Missouri, laden with goods in interstate commerce, and said James Lee David was riding said train between said Kansas City, Missouri, and Leavenworth, Kansas, as a train rider

in accordance with instructions given him by defendant, and in the performance of his duties as the employee of the defendant as aforesaid, and without any knowledge or warning of said contemplated robbery; that said thieves and robbers, while attempting to carry out their design to rob said train, saw said David upon said train and did then and there with a firearm shoot and kill said David in the early morning of said May 17, 1923; that said defendant through its agents and employees knew of said contemplated robbery in time, by the exercise of ordinary care, to have frustrated and prevented the same and to have afforded protection to said James Lee David and to have warned said James Lee David of said proposed robbery so that said James Lee David could have protected himself, but said defendant negligently and carelessly failed so to do, and as a result thereof said James Lee David was shot and killed as aforesaid.

(5) Said David was a married man at the time of his death and left surviving him, his widow, Sophia David, wholly dependent on him for her support, and two children, partly dependent on him for support.

(6) At the time of his death said David was a strong, able-bodied man, forty-two years of age, sober and industrious, earning and capable of earning a good livelihood for himself and his family; that the said Sophia David and her children derived pecuniary benefits from his labor, and his wrongful death deprived them of pecuniary benefits which they were then receiving and had reasonable expectation of receiving in the future.

Wherefore, plaintiff, for the benefit of said widow and children, prays damages in the sum of Sixty Thousand ($60,000.00) Dollars, together with her costs in this behalf expended.

To this amended petition, defendant, on the 19th day of February, 1927, filed its answer which (omitting caption and signature) was as follows:

Answer to Amended Petition.

Now comes the defendant, and for answer to the plaintiff's amended petition herein denies each and every allegation therein contained.

Further answering said petition, defendant avers that the deceased, James Lee David, at and prior to his fatal injury was familiar with and voluntarily assumed all the risk of any and all hazards and dangers which in anywise caused or contributed to his fatal injury.

Wherefore, defendant asks to be discharged with its costs.

To this answer plaintiff filed her reply consisting of a general denial.

Abstract of Record Entries.

This case was duly assigned for trial to Division No. 8 and came on for trial on the 18th day of June, 1928, same being the 30th day of the regular May, 1928, Term of the Circuit Court of Jackson County, Missouri, at Kansas City before the Honorable Ralph S. Latshaw, Judge of said Division No. 8, and resulting on the 19th day of June, 1928, same being the 31st day of the regular May, 1928, term

of said court, in a verdict for the plaintiff and against the defendant for $15,000.00 upon which verdict judgment was on said day rendered.

Afterwards, to-wit: on the 20th day of June, 1928, same being the 32nd day of the regular May, 1928 Term of said court, and within 4 days after the rendition of the verdict and the judgment thereon, the defendant filed in said cause its motion for a new trial and its motion in arrest of judgment as shown by the following record entry in said cause:

"Now on this day defendant Missouri Pacific Railroad Company, files motion for a new trial in this cause."

"Now on this day defendant, Missouri Pacific Railroad Company, files motion in arrest of the judgment in this cause."

Afterwards, to-wit: on the 30th day of June, 1928, same being the 41st day of the regular May, 1928, term of said court, the court overruled the defendant's motion for a new trial of this cause and defendant's motion in arrest of judgment as shown by the following record entry in said cause:

"Now, the motion by defendant for a new trial of this cause is by the court overruled, to which action and ruling of the court the defendant excepts."

"Now, the motion of defendant in arrest of judgment in this cause is by the court overruled, to which action and ruling of the court defendant excepts."

Afterwards, to-wit: on July 7, 1928, same being the 46th day of the regular May, 1928 term of said court, and during the same term in which defendant's motion for new trial and motion in arrest of judgment was overruled and excepted to, de-

fendant presented and filed its application and affidavit for an appeal from the judgment of said court in said cause; said application was on said day by the said court sustained and its appeal duly allowed to the Supreme Court of Missouri and its appeal to this court was duly taken.

On the same day leave was by said court granted defendant to file an appeal bond in the sum of $31,000.00 which appeal bond was by said defendant on said day filed and presented, and by the court duly approved.

On said day the defendant was granted leave to file its bill of exceptions in this cause on or before the last day of the regular September, 1928, Term of this court and that said time was thereafter duly extended by said court to the last day of the November, 1928, term of said court.

Thereafter, and within the time duly allowed by the said court for the filing of said bill of exceptions, the said bill of exceptions was duly signed and filed and made a part of the record in this cause, which said bill of exceptions so signed and so filed is (omitting caption) as follows, to-wit:

BILL OF EXCEPTIONS ON BEHALF OF DEFENDANT.

Be it remembered, that on the 18th day of June, 1928, the same being the 30th day of the regular May Term, 1928, of said Circuit Court, this cause coming to be heard before the Honorable Ralph S. Latshaw, Judge of said court and a jury duly empaneled, the plaintiff appearing by McVey and Freet, and the defendant appearing by its attorneys Hackney & Welch, by Mr. Hackney representing said firm, whereupon, the following proceedings were had and entered of record on said day and the days hereinafter mentioned, to-wit:

Mr. Freet: If the court pleases, it is admitted between plaintiff and defendant that at the time of his death Mr. David was engaged in interstate commerce, the train upon which he was employed was engaged in interstate commerce, and that this is a suit under the Federal Employees Liability Act. I will now introduce in evidence the deposition of R. S. Mitchell. The original is missing from the court files and Mr. Hackney and I have an agreement that this may be used with like force and effect as the original; that each of us have a carbon copy.

Admitted in evidence.

The same is here marked Plaintiff's Exhibit 1 as follows:

Deposition—R. S. Mitchell.

Direct Examination by Mr. Boisseau.

Q. State your name? A. R. S. Mitchell.

Q. Where do you live, Mr. Mitchell? A. St. Louis.

Q. How long have you lived in the City of St. Louis? A. Since 1903.

Q. What is your occupation? A. I am a railroad official.

Q. With what railroad? A. Missouri Pacific Railroad.

Q. How long have you been employed by the Missouri Pacific? A. Since 1912.

Q. And in what capacity are you now employed? A. Chief special agent.

Q. How long have you held that position? A. Since 1912.

Q. What are your duties as chief special agent? A. They are too numerous to detail.

Q. Does that include doing police work and having charge of the— A. It includes the supervision of police work.

Q. The supervision of police work? A. Yes, sir.

Q. Of course, you don't actually do that sort of work yourself, but you have charge of that department of the railroad? A. Yes, sir.

Q. That includes what? A. I believe you have defined it as police work; I think that covers the ground.

Q. Can you tell us in a general way what that is? A. Police work means protection of the property of the railroad and of the property entrusted to the railroad.

Q. Are you the head of that department for the entire Missouri Pacific System? A. Yes, sir.

Q. Now in that capacity, is it part of your duties to employ men who are to protect the property belonging to the Missouri Pacific Rail-

road and being handled in their freight trains and other trains? A. You mean, to personally employ them?

Q. Yes. A. No, sir.

Q. Do men in your department, working under your direction, employ persons—such persons as you have described? A. Yes, sir.

Q. Just what do you, personally, have to do with reference to that? A. I supervise the service; in order that you may understand the organization, and also understand that I am not trying to evade anything, I want to give you all the information that you want—

Q. I understand. A. Our special service is divided into a great many units, a great many heads; as an illustration, we have sixteen divisions on our system; there are sixteen special service heads under my direction, scattered all over the railroad; each divison having a special service representative or special agent. Now, all of the men entering the service under a special agent are employed at various special service headquarters. I take it you want to know as to the employment of men in Kansas City?

Q. I will get to that, yes? A. Cut that out, then, please.

Q. Mr. Mitchell, you say there are sixteen special agents working under you? A. Yes, sir.

Q. Now, do those men have charge of a different character of service, or just different territory? A. Different territory.

Q. Different territory? A. Yes, sir.

Q. Who is the special agent at Kansas City? A. Mr. J. H. Baehr.

Q. He is the gentleman who used to be here in St. Louis, I believe? A. Yes.

Q. Is there a special agent in Kansas City by the name of Boult? A. No, sir, there is an assistant chief special agent in Kansas City named Boult; he is my assistant there.

Q. That is Mr. W. H. Boult? A. Yes, sir. Further explaining my organization, I have two assistant chief special agents, one located at Kansas City, and the other located at Little Rock.

Q. Your chief special agent at Kansas City is Mr. Baehr? A. No, my assistant chief special agent at Kansas City is Mr. Boult; my special agent at Kansas City is Mr. Baehr.

Q. Then the man who is at the head of this service at Kansas City, directly under you, is the assistant chief special agent, Mr. Baehr? A. No, sir. Mr. Baehr is the special agent at Kansas City; here is the head of the service (illustrating); for the purpose of administration, we split the system in two, then we have an assistant chief at Kansas City and an assistant chief at Little Rock; now, the division special agents are—he keeps in touch immediately with the division special agents; the division special agent at Kansas City is Mr. Baehr.

Q. He has charge of all the men at Kansas City? A. Yes, sir.

Q. And all of your assistant agents or employes in that department at Kansas City are under Mr. Baehr? A. Yes, sir.

Q. Now, Mr. W. H. Boult is one of those? A. No, Mr. W. H. Boult is superior to Mr. Baehr.

By Mr. Hackney: He is assistant chief.

By the Witness (illustrating): This is my office, St. Louis; here is Mr. Boult at Kansas City; he is colonel or a major, he is a major in the organization; the other gets down to a captain.

Q. I probably had Mr. Boult and Mr. Baehr twisted? A. I believe you had them twisted, yes.

Q. Is Mr. Boult the man that is in charge of the men in Kansas City, in the Kansas City office? A. That is, he is in charge of the Kansas City office, like he is all the western offices. Now, the man immediately in charge of the Kansas City office is Mr. Baehr, but he has supervision over Mr. Baehr.

Q. How long has Mr. Boult occupied that position? A. I think since about 1913.

Q. At any rate, you are sure he occupied that position throughout the year 1923? A. Yes, sir.

Q. And since that time? A. Yes, sir.

Q. Now, Mr. Mitchell, are you acquainted with a man by the name of Harry McCarthy? A. Yes, sir.

Q. Is he now employed by the Missouri Pacific Railroad Company, in your department? A. No, sir.

Q. Was he ever employed in that department? A. Not as a member of the department, no.

Q. Was he ever employed as an employee of the railroad company, at all, by you or by anyone working under you? Yes.

Q. Who employed him? A. I did.

Q. And when did you employ him? A. Oh, in April, 1923, I think it was.

Q. Do you know about the time; was it the 3rd or 5th— A. I think it was the 5th.

Q. The 5th day of April, 1923? A. That is my recollection.

Q. Where was he employed? A. Kansas City.

Q. You personally saw him in Kansas City? A. On that date, yes.

Q. Where did you see him there? A. Hotel Baltimore.

Q. Had you known him before that time? A. No, sir, I met him on that day.

Q. Met him that day? A. Yes, sir.

Q. How did you happen to meet him? A. I met him through some acquaintances, they brought him to me.

Q. And in what capacity did you employ him? A. As McCarthy; he was a thief at that time.

Q. You didn't employ him for that purpose? A. I employed him as an informant.

Q. You say he was a thief at that time? A. Yes, sir.

Q. What is your information—what information have you about that?

By Mr. Hackney: Just state how the matter came to you, Mr. Mitchell?

By the Witness: In order that you may understand this employment thoroughly, the Missouri Pacific Railroad was being harassed, annoyed and robbed by what we term an organized gang of thieves, in and adjacent to Kansas City; I was personally very much concerned about our losses, and in a meeting of chief special agents somewhere—I don't know where that was—I told my

troubles to these gentlemen, and one of those men was Mr. Gale, chief special agent of the Union Pacific Railroad. Shortly after this conference that I refer to, which may have been in Chicago—I don't know where—I received a letter from Mr. Gale, saying he was advised by his Mr. White, his division special agent at Kansas City, that a man named McCarthy, a member of this gang of thieves, would, for a consideration, be an informant or snitch, as it is usually called in the thief parlance, and assist us in catching this gang of thieves robbing us in that territory. I then, of course, thanked Mr. Gale for his information, and arranged with him to meet his Mr. White in Kansas City, and through Mr. White, to meet Mr. McCarthy. I went to Kansas City, to the Baltimore Hotel, at a later date and 'phoned Mr. White, who brought McCarthy to my room. I talked with McCarthy probably two or three hours, at which time he told me the history of the robberies committed by this gang; he told me at that time who was acting as head of the gang, who was furnishing the brains for these thieves, and he told me a great many details in connection with these robberies; he told me that he was trailing with the gang and he wanted to get away from them. I arranged with him to keep us informed as to the activities of this gang, to give us advance information, if possible, when this gang planned to rob our trains, and further arranged with him, in the event he could not get to us, couldn't give us advance information, to give us information then as to the fence where the stuff was taken, as well as who was in the robbery, and all the details pos-

sible. Now, after I had satisfied myself that McCarthy knew what he was talking about, and I believed he could do what he contracted to do, I arranged with him to pay him one hundred and fifty dollars a month for that sort of service, and then I called in my assistant, Mr. W. H. Boult, and I introduced Boult to McCarthy, and arranged with McCarthy his way of reporting to Mr. Boult, and left the matter in Mr. Boult's hands.

Q. McCarthy was to report to Mr. Boult? A. Yes, sir.

Q. He wasn't to report to you? A. Oh, he never did report to me any details after that.

Q. In other words, did he meet anyone in the Kansas City office besides Mr. Boult? A. No, no, he never went to the Kansas City office, as far as I know; this was a hotel transaction; then my understanding is, he reported to Mr. Boult by 'phone; that was the arrangement made at that time, and if it was necessary to arrange a meeting, he was to arrange a meeting by 'phone.

Q. He knew how to get hold of Mr. Boult? A. Yes, night and day service.

Q. And where he could reach Mr. Boult at any time if he might want him? A. Yes, sir.

Q. Did you know who the thieves were with whom he was supposed to be associating? A. He told me all of their names at that time.

Q. Who were they? A. I don't remember all of them; one was named Loar, one was Gadsden—

By Mr. Hackney: I think it is Gladsten; Hayes.

By the Witness: Yes, Hayes; Loar; Gladsten; I don't know; there was a dozen of them; he told me

about a meeting at a lawyer's office there Charlie Thompson; he told me a lot of stuff you had better not put in this deposition, I expect.

Q. You are referring to Charlie Thompson, the election commissioner? A. I don't know who he is; I know he is a lawyer.

By Mr. Hackney. He was a lawyer at Kansas City defending this bunch of thieves.

Q. You mentioned Bill Gladsten, Red Loar and Lawrence Hayes as three of the men he told you about? A. Yes, sir, that is my recollection.

Q. Do you remember any other thieves? A. No, sir.

Q. You said he told you who was the leader of the gang; do you remember who that was? A. No, I don't remember which man he designated; he didn't use the word leader—brains.

Q. You say you employed him at a salary of one hundred and fifty dollars per month? A. Yes, sir.

Q. Do you know how he was paid—cash or check? A. Cash, usually.

Q. Who paid him? A. Mr. Boult.

Q. Do you know whether Mr. Boult paid him by cash or check? A. I sent Mr. Boult checks covering his pay, as well as I did some other men similarly employed; now, whether Mr. Boult gave him his check, or cash, I don't know, but I received a receipt from Mr. Boult, signed by McCarthy, for that money.

Q. If it was paid by check, where would those checks be? A. Mr. Boult would have them, if it was paid by check but I don't think he paid him by check; we don't pay those people by check.

Q. Did you know at the time you employed McCarthy that shortly before that he had been convicted in the District Court of Atchison, Kansas, of robbing freight cars? A. Oh, yes, he told me of that conviction during this talk.

Q. How long was that before you had a talk with him? A. I don't remember.

Q. At the time you employed him, he was out on bond pending the appeal of this case to the Supreme Court of Kansas? A. He may have been; I don't know; he had been tried, and I assume that he was, yes.

Q. He had been tried and convicted? A. I take it he was on bond; yes; I assume he was; my recollection is, he told me all about that trial and conviction; I tried to make him tell me his life's history, and I am satisfied he told me of the trial and conviction, and told me he was guilty, too, as far as that is concerned.

Q. Told you a number of other things about his former life? A. In a general way, yes.

Q. Did you know he had been charged with killing a policeman in Kansas City, named FitsGibbons? A. He hadn't been at that time; as I recollect it, that is a later matter, as I understand it.

Q. He didn't tell you that? A. No.

Q. You didn't know that at the time? A. No.

Q. Did you know he had been confined for a period of time in the Industrial School at Topeka, Kansas? A. He told me that.

Q. Did you know he had been confined at one time in the State Reformatory in Minnesota? A. I don't remember his having said that, but, as I recollect it, his whole life had been a life of crime.

Q. You don't recall that particular instance? A. No, sir.

Q. Did you know he had formerly been on the police force in Kansas City? A. No, I don't remember that.

Q. He didn't tell you that? A. I didn't say that; I said I don't remember that; I don't remember whether he told me, or not.

Q. You didn't receive any information that he had been discharged from the police force for shaking down bootleggers? A. No, but if he had been so charged, that wouldn't have interfered in any way with my employing him to be a snitch on a bunch of thieves.

Q. That was the kind of man you were looking for? A. That is the kind of man I wanted, and I knew at the time I employed him what kind of a man he was; that is the way I broke up the gang.

Q. I believe you stated a while ago that it was part of his duties to learn from this gang of thieves when they were going to pull off a robbery? A. Yes, sir.

Q. And it was also his duty to accompany them? A. There was nothing said as to his accompanying the men; that was covered by the general understanding that he was to continue with this gang as formerly; he told me he had been [redacted]ng with this gang; now, I assume, yes, that it was understood he would keep on trailing with them and keep on going with them, but notify us, if possible, beforehand, when he did so, and if possible, to notify us afterwards.

Q. You expected him, I believe you stated, if you couldn't frustrate the robbery— A. He had no instructions to frustrate robbery.

Q. I say, if you couldn't do that, to find out where the stores were located? A. Yes, sir.

Q. Who the fence was? A. Yes, sir.

Q. Now, he was instructed to notify you when these things were going to take place, if possible? A. Notify Mr. Boult, or a man suggested by Mr. Boult, not me.

Q. Not you personally, but to notify you or some of your subordinates? A. Yes, sir.

Q. You say he was to make his reports to Mr. Boult? A. Yes, sir.

Q. Or to someone that Mr. Boult might designate? A. That is it; I left him in Mr. Boult's lap.

Q. That was to enable you to fortify yourselves against the expected robbery? A. Yes, that was to enable us to catch these thieves.

Q. You expected, whenever you got notice from McCarthy that anything like that was to take place, to detail additional men on the train at that time, or wherever the robbery was to occur. A. No, it was taken care of in various ways; that was one of the ways.

Q. What were the other ways? A. Take an automobile and go out and intercept them.

Q. Now, did he have any instructions, Mr. Mitchell, to instigate any robberies, to lead them into a trap? A. Oh, absolutely no.

Q. You didn't expect him to work up a robbery and lead these people into a trap? A. Certainly not.

Q. You never planned anything of that sort at any time? A. Certainly not.

Q. Now, did you have in your employ in April of 1923, a man by the name of David? A. I think so.

Q. In what capacity was he employed? A. He was a special officer or a train rider.

Q. That is James Lee David? A. I believe so.

Q. Do you know who employed him? A. My recollection is he was employed by C. M. Barber.

Q. Who was Mr. Barber? A. Mr. Barber was special agent at Kansas City at that time.

Q. When was he employed, do you know? A. I think about April, 1923, about the same time that McCarthy was employed.

Q. What was he doing; in what capacity was he employed? A. He was employed as special officer or train rider.

Q. What are the duties of a train rider? A. A train rider is a man who rides a train, a freight train, for the purpose of protecting it against robbery, against thieves.

Q. And David then was performing the duties of a train rider? A. Yes, I assume so.

Q. Do you know where he worked? A. Kansas City.

Q. Did he work on any trains that were going out of Kansas City? A. Yes, always on trains going out of Kansas City, or coming in, one or the other.

Q. He went on freight trains carrying merchandise, I suppose? A. Yes, sir.

Q. No particular run; he didn't have any particular run—just any trains coming in or going out? A. I wouldn't attempt to, and I can't tell you that, but I know he was one of several men detailed to the Kansas City office; now, those men were instructed by the local man as to what trains they should ride, when they were to go and when they were to return.

Q. Was he accompanied by anyone else? A. I don't know.

Q. Going on these merchandise trains? A. I don't know.

Q. You don't know whether he was the only train rider on one of them, or whether there was more than one? A. Sometimes there was more than one, sometimes there was one.

Q. On what occasions would there be more than one? A. I don't know; those were details attended to by the local people.

Q. You know in a general way when they would decide to have one on a train and when more than one; you know what would cause them to send more than one? A. If they had the men available, they would probably send more than one, or if the local man thought it necessary for some reason, he might send more than one; that was a matter left in the local man's hands; I gave no particular instructions as to that.

Q. By the way, do you know where McCarthy is now? A. No.

Q. Is he still employed by the railroad company? A. He is not.

Q. When did he leave the employ of the railroad comany? A. I don't know the exact date.

Q. You don't know where he is now located? A. No, sir.

Q. McCarthy's conviction was later affirmed by the Supreme Court of Kansas, wasn't it? A. I don't know.

Q. You don't know about that? A. I probably have all that in my file, but I don't know.

Q. You have no information now about it? A. What is the question?

Q. His conviction was later affirmed by the Supreme Court of Kansas, and he was pardoned by Governor Davis? A. I believe he was pardoned; he is out, at any rate.

Q. Did you have anything to do with securing his pardon? A. Not personally.

Q. Did anyone connected with the Missouri Pacific Railroad, that you know of? A. I don't know that they did not, or that they did; I have no information on that.

Q. At any rate, he is out now, and you don't know where he is, or where he could be located? A. No, sir.

Q. If he had made any reports, he would have made them to Mr. Boult or someone designated by him, would he? A. Yes, sir.

Q. Was he to make reports verbally or in writing? A. He was to make them by 'phone—verbally.

Q. He wasn't instructed to make any written reports? A. Oh, no.

Q. Then, if he made any reports, he made them to Mr. Boult, or to Mr. Boult's assistant? A. I assume so.

Q. Do you know anyone else, other than Mr. Boult, to whom he made any reports, or had any conversation? A. No, I don't.

Q. Mr. Boult would know that? A. Mr. Boult would know that.

Q. You are sure there was no written report of any kind that he made? A. None that I know of.

Q. Do you know whether or not he had accompanied this gang of thieves, or any other gang of thieves, on any of these expeditions prior to the time David was killed? A. I don't know anything about that.

Q. Any reports ever reach you with reference to any of them? A. I don't remember any such reports.

Q. As far as you know, after McCarthy was employed, this particular robbery in which David was killed was the first one that he had information of? A. I didn't say that at all; I don't know of any other reports at all. Now, Mr. Boult may have received reports of numerous attempted robberies; we were being robbed every week around Kansas City at this time.

Q. What I am asking now is, did any information come to you of any robberies that he knew anything about, between the time he was employed and the time Mr. David was killed? A. I don't recollect any such reports.

Q. Then, I say, as far as you know, he had no information concerning any robberies? A. As far as I remember now, I received no reports.

Q. Now, he did know about this attempted robbery that occurred at the time David was killed? A. How is that?

Q. I say, McCarthy did know about that?

By Mr. Hackney: I object to that question as assuming—

A. I don't know whether he knew about it, or not.

Q. Well, didn't McCarthy later on report that these were the men— A. To whom?

By Mr. Hackney: I object to that as hearsay.

Q. Report to someone connected with the Missouri Pacific? A. He didn't report to me.

Q. Were any reports made to the company that you have any knowledge of? A. No, sir.

Q. Concerning his connection with this robbery? A. He may have made reports, but I don't know anything about them.

Q. Was David working under Mr. Boult also? A. In this way: He was working for the division special agent, who was working under Mr. Boult.

Q. Do you know who employed, Mr. David? A. I think Mr. Barber, C. M. Barber.

Q. Mr. Boult didn't do that personally? A. No, he didn't do that personally.

Q. Did you ever see McCarthy between the time you first employed him and the time David was killed? A. I don't think so.

Q. Never talked to him any more? A. I don't think so.

Q. All the instructions you gave him were given at the time you employed him in the Baltimore Hotel? A. Well, any further instructions; of course, went through Mr. Boult; I may have conferred with Mr. Boult and he may have car-

ried something from me to McCarthy, but, personally, I never talked to Mr. McCarthy.

Q. Do you recall any instructions that you told Mr. Boult to give him after you employed him? A. No, I wouldn't give Mr. Boult a specific instruction of that sort, any way; he is a capable man and after making an arrangement of this sort, I simply left it in his lap. We can't pass those details down that way.

Q. You may have talked to Mr. Boult about McCarthy's duties? A. No, I certainly would not; I did not.

Q. How long did McCarthy remain in the employ of the company after this—how long did he remain in the employ of the company? A. I don't know; sometime after McCarthy testified, we got him a job at some of our roundhouses or shops, and I kept him employed for some time, as long as he wanted to be employed; finally, he left of his own accord.

Q. After these men were tried, he didn't work any longer in the capacity in which he was first employed? A. No, there was no longer any necessity for it; they were convicted; then he was found a job as a laborer or something of that sort in our shops.

Q. Where did he work, what shops? A. I think at Kansas City.

Q. Shops at Kansas City? A. I think so.

Q. Do you know how long he continued working there? A. No, I don't know as to that, but some time.

Q. You don't remember the last time that he worked for the company? A. No, I have no information on that.

By Mr. Hackney: That is pretty hard to trace; he probably worked in some other name.

Q. What is the last time you have any definite recollection of McCarthy? A. The last time?

Q. Yes. A. I couldn't give you a date at all; he remained in our service for some time, I don't know how long—as long as he wanted to stay. My recollection is that Mr. Boult told me that McCarthy had quit and gone off; it is indefinite in my mind; I don't remember what he said to me; my instruction to Boult was to help McCarthy and keep him employed in a laborer's job, so that he would go straight.

Q. And you can't recall now the last time that you have any knowledge of his still being in the employ of the company? A. No, I couldn't tell you any date.

Q. As far as you recall, the last place he ever worked was probably in a shop or roundhouse at Kansas City? A. Yes, I think that is true.

By Mr. Boisseau: I think that is all.

Cross Examination by Mr. Hackney.

Q. Mr. Mitchell, I understood you to say that your sole purpose in employing Harry McCarthy was to get information of the activities of this bunch of thieves that had been robbing the box cars? A. That is true.

Q. And he was not—you didn't authorize him to carry a gun or arm himself in any way? A. No, not at all.

Q. Or to do any act of apprehending any person, or frustrating any criminal act? A. No, sir.

Q. He was simply to get information? A. Information was all we wanted from McCarthy.

Q. And he wasn't to stage any robberies? A. It was understood that he never had staged any, and that he was not to stage any; the understanding was, he had been trailing with these people and was to continue to do so.

Q. So after the killing of David, then McCarthy assisted in convicting these men that were responsible for Mr. David's death? A. Testified against them, yes, sir.

Q. They were on trial over there in the Kansas court and Gladsten is the man shown to have shot David? A. Was convicted of shooting David.

Q. And is serving a life sentence now? A. And is serving a life sentence now.

Q. At Lansing, Kansas? A. Yes, sir.

By Mr. Hackney: That is all.

Re-Direct Examination by Mr. Boisseau.

Q. You say, I understood, that it was understood he had never staged any robberies?

By Mr. Hackney: No, that he didn't authorize him to stage any.

A. He told me, in talking of the brains of the gang—I asked him if he had ever planned any of these robberies, or had ever been the leader, and he laughingly said, no, he didn't have brains enough, and he never had been the brains of the gang.

Q. Now, have you testified here, as near as you can recall, to the substance of all the conversation you had with him at that time? A. No, I talked to him three hours and I haven't attempted

to detail that conversation here, and I won't attempt to detail it.

Q. You gave quite a little bit of it in your direct examination? A. The high lights that I remembered at that time, yes.

Q. Do you remember any more of it? A. I might ramble on here and tell you some things he said; they are not so clear in my mind, though, as they were a day or two after that, or a year after that, if you please.

Q. It was all along the same line you have testified to? A. Yes.

Q. Now, did you talk to him about carrying a gun at all? A. My recollection is that he told me he didn't have a gun and didn't carry one, but I am not clear on that.

Q. That is your recollection about it now? A. Yes, that he did not carry a gun in any of these robberies.

Q. You didn't discuss with him the question of whether or not he was to carry a gun, did you? A. My recollection is not clear as to what he may have said about a gun, but if—I will put it this way—if he at any time mentioned the gun proposition, it is safe for me to assume that I warned him to leave his gun at home and not to have a gun.

Q. You are stating that because you think that is what you would do under those circumstances, and not because you remember? A. Exactly, and I told you awhile ago I didn't remember it, and you are insisting on me saying something.

Q. No, I am not, Mr. Mitchell. A. Well, I don't remember his saying anything about a gun to me except that he did not have a gun.

Q. All right? A. Now, in talking to a man about a gun, when he tells me he hasn't got a gun, I assume he is not carrying a gun; I know he is not carrying it at that time, because he hasn't got one, and it is safe for me to assume, because it is my practice, to say "You are better off without one," or "If you have got one, you had better leave it home," but I don't remember to have discussed the gun proposition, other than McCarthy saying "I haven't got a gun."

Q. You don't have any recollection of telling him anything about it, do you? A. No, but I have a recollection of McCarthy saying he didn't have a gun.

Q. The substance of your three hours' conversation amounts to this, then: That he was to continue to trail with these thieves, with whom he was acquainted, and was associating, to acquire any information he could possibly get about any anticipated robberies they were going to pull off, and to immediately inform you of those things? A. Yes. Now, this conversation wasn't so much on my part to get details of McCarthy's past life, etc., but was to get a reaction or an impression as to what I could expect from McCarthy in the way of assistance.

Q. Whether or not you could trust him? A. Absolutely; during this talk I convinced myself, here is a man I could use; when I got to that point, I called to Mr. Boult; that is the reason I don't remember a lot of these details; a lot of

this talk was not for the purpose of getting details; it was for the purpose of getting impressions.

By Mr. Boisseau: That is all.

Further Cross Examination by Mr. Hackney.

Q. You do know that you did not expressly direct, or even authorize McCarthy to carry a gun? A. Never at any time.

Q. There was no understanding that he should be armed as he went out with these thieves? A. Never, and never any understanding that he was to try to apprehend any thieves.

Q. On the contrary, he was not to do that? A. Not to do that; in fact, it was agreed that he would not be even asked to testify against these thieves; he was employed as a snitch.

By Mr. Hackney: That is all.

Mr. Freet: The plaintiff now offers in evidence the deposition of Mr. Boult.

Admitted in evidence.

Which said deposition is in the words and figures as follows, to-wit:

W. H. BOULLT, of lawful age, produced, sworn and examined as a witness on behalf of plaintiff, deposeth and saith:

Direct Examination by Mr. Talbert.

Q. State your full name? A. W. H. Boullt.

Q. And where do you reside? A. 5501 Woodland, Kansas City, Missouri.

Q. Where are you employed? A. Missouri Pacific Railroad Company.

Q. What capacity? A. I am assistant chief special agent.

Q. Where is your office located? A. Union and Liberty Streets.

Q. Kansas City? A. Kansas City.

Q. How long have you held that position? A. Since 1916.

Q. Who is the chief special agent? You say you are assistant. A. Let me get you right on that, I held that before that I was special agent before that.

Q. Well, how long have you been assistant chief special agent? A. Since 1916.

Q. Were you connected with the company before that? A. Special agent from 1910.

Q. Since 1910? A. Yes, sir.

Q. Who is chief special agent? A. R. S. Mitchell.

Q. St. Louis? A. St. Louis, Railway Exchange Building.

Q. What part of the system do you have charge of? A. I have everything west of St. Louis.

Q. What are your duties as assistant chief special agent? A. To instruct special agents and special officers in their work.

Q. And what does that generally consist of? A. Well, some damage suits, some personal injuries, mostly robberies.

Q. Do you have charge of the employees known as train riders? A. I am over all the men, I do not hire them. The special agent in each terminal hires them in.

Q. Who is the special agent at Kansas City? A. J. H. Baehr now.

Q. Was he the special agent at Kansas City at the time Mr. David was killed, namely May 17, 1923? A. He was not.

Q. Who was special agent at that time? A. C. M. Barber.

Q. Where is he now located? A. In St. Louis.

Q. Still connected with the company? A. Yes, sir.

Q. Was the company employing any train riders in the month of May, 1923? A. Yes, sir.

Q. At Kansas City? A. Yes, sir.

Q. What were the duties of a train rider? A. The duties were where our trains start to go over the trains, examine the trains before departing from the terminal.

Q. For what purpose? A. To see that they were all right.

Q. Well, in what respect, that they were all right? A. No seals broke, properly sealed.

Q. And then when the train started they would go with it? A. They would go with it.

Q. And what would be their duties along the road? A. If the train stopped anywhere, to go and see if the seals were all intact and the train was all right.

Q. Where were they expected to ride when the train was enroute? A. While they were on the train?

Q. Where would they ride? A. That was left to their judgment, we couldn't just tell them where to ride.

Q. You mean as their work required it, they might ride inside the box car or outside the box

car in the caboose? A. Or in the caboose, we always left that to their judgment.

Q. Were any train riders instructed to go armed? A. We never instructed them at all, they was to protect the train.

Q. You knew, did you not, as to whether or not they were going armed, or whether they were going unarmed? A. Apparently did.

Q. Well, didn't you give them any instructions in that respect? A. We never gave them any instructions not to go armed.

Q. Well, did you ever give them any instructions to go armed? A. I don't know that I ever did.

Q. When they went armed who provided them with guns, pistols, or firearms? A. They had them themselves. We didn't, the Missouri Pacific didn't.

Q. Were these train riders—did they hold commissions as special officers? A. I think they did.

Mr. Hackney: You mean from the local authorities? A. From the local authorities, yes, sir.

Q. Who attended to getting their commissions? A. Well, if they got a police commission they would make out a form which would be presented to the Board of Commissioners, sometimes we would O. K. the form for them.

Q. Do you recall when David was employed? A. No, I just can't recall the date, can't remember the date, I may have been on the road.

Q. Can you recall how long he had been working for the company prior to his death? A. No, I can't state that.

Q. He was employed as a train rider as I understand? A. Yes, sir.

Q. Do you have any recollection as to how long he had been working for the company, was it a year, or a few months, or two months, or what? A. Oh, it was several months, I couldn't say, might have been one month or two months or three months.

Q. Did he have any particular run assigned to him? A. We don't assign—in a way we do and in a way we don't, this man, at that time, I think, was riding between Kansas City and Atchison.

Q. Atchison Kansas. A. Atchison, Kansas.

Q. You mean between Kansas City, Missouri, and Atchison, Kansas? A. Between Kansas City, Missouri, and Atchison, Kansas.

Q. Who would direct the train riders from time to time as to what runs they would take? A. The special agent.

Q. That would be Mr. Baehr? A. Mr. Baehr or Mr. Barber who was here at that time.

Q. Do you know what wages David received? A. I think $135.00 a month, and his expense when he was away from the terminal.

Q. He would ride freight trains, as I understand it? A. Yes, sir; and sometimes passenger trains.

Q. Now, on this run to Atchison, where would the train be made up? A. The train is made up in the east bottoms, that is the east yards, Kansas City, Missouri.

Q. Is that the place where he would make this inspection and board the train? A. Sometimes, sometimes he wouldn't.

Q. Where would he board it at other times? A. It would be near the Kaw Bridge.

Q. Is that in Kansas, or Missouri? A. Just across the line in Missouri.

Q. I wish you would just explain? A. At times the merchandise would be pulled from the house and set over on A. C. Junction, that is just this side of the Kaw Bridge.

Q. In Missouri? A. In Missouri. He would inspect it there, he would sometimes go over there and inspect these cars while they were standing there before the train came through and picked them up, then sometimes he would inspect them over in Kansas City, Missouri.

Q. What do you mean by "merchandise being pulled from the house"? A. That is merchandise loaded at our freight house—loaded at our freight house—destination may be Atchison, St. Joe, Omaha, or Falls City, Nebraska, or different places in Nebraska.

Q. Where was your freight house located? A. Union and Liberty Street.

Q. Kansas City, Missouri? A. Kansas City, Missouri.

Q. Are you acquainted with a man by the name of Harry McCarthy? A. Yes, sir.

Q. Where did you first become acquainted with him? A. I think it was in the Baltimore Hotel.

Q. Kansas City, Missouri? A. Kansas City, Missouri.

Q. About what date? A. About the fifth of April, 1923.

Q. What was the occasion for your meeting him there? A. I was called there by Mr. R. S. Mitchell, chief special agent.

Q. What was the purpose of meeting McCarthy there at that time? A. Why he and Mr. Mitchell had been talking over different robberies that had happened on the road and we were figuring on employing McCarthy, I think, at that time.

Q. Well, was McCarthy employed there on that date? A. He was.

Q. What did McCarthy say in respect to any robberies, hold-ups, he had been connected with? A. He was working with a gang that had been robbing cars.

Q. What did he say about that? A. He said he knew who were robbing the cars.

Q. At what particular place, what particular cars? A. Different places on the road.

Q. Well, can you mention any particular run? A. Well, no particular run, they don't rob any particular runs at different parts of the road, they may have been robbing at Atchison, Leavenworth, Stillwell, Kansas, and Osawatomie, Kansas.

Q. Well, now, did McCarthy say he had been participating with this gang? A. I don't know whether he said he had been participating, but he knew them and would assist us in locating them.

Q. You knew at the time that McCarthy was a box-car thief himself, did you not? A. I knew he had been, yes, sir. I had heard it.

Q. You knew, did you not, that he had been convicted for robbing your own company's cars at Atchison, Kansas, didn't you? A. Yes, sir.

Q. And was out on bond at the time you had this conversation with him there at the Baltimore Hotel? A. I don't know just how the cases stood.

Q. But you did know he had been convicted for robbing your box-cars? A. Yes, sir.

Q. Did McCarthy tell you anything about his past life? A. Later on he did.

Q. What did he say about that? A. That he had went to reform school.

Q. Where? A. At Minneapolis, I think he said, as a boy.

Q. Did he tell you any other institutions he had been in? A. I don't think he did.

Q. Who did he say this gang of robbers were that he knew and that he could inform you about? A. Bert Gladston, Red Loar, Lawrence Hayes, Hoggy Ward, I think he mentioned, he may have mentioned others, I couldn't very well remember right now.

Q. Well, now, did he tell you he had been robbing with these men, or that he merely knew them? A. I took it from his talk he had been with them.

Q. Participating? A. Participating, yes, he didn't come right out and say it, but I took it from his talk.

Q. Did he say anything about why he was willing to give information about his comrades? A. I think he said he wanted to start over and lead a new life, I think that is about what he said.

Q. What salary did the company undertake to pay him, or wage? A. Well, it is one hundred and fifty dollars a month, at that rate, at the rate of one hundred and fifty dollars a month.

Q. How frequently was he to be paid? A. Every month.

Q. By the month? A. Well, yes, by the month, and if he wanted money, we would give it to him.

Q. Was he to receive any additional money for expenses or anything of that sort? A. No, sir.

Q. Now, when he was employed what instructions did you give him in respect to what he was to do? A. Well, we couldn't very well give him instructions, he was a man to furnish us with information where these robberies were committed, who was committing them and if he could get to us in time to tell us before the robbery was committed, if not, to tell us what had become of the goods.

Q. Well, what was the plan and arrangement in respect to whether or not he was to go with this gang on their robberies, robbing expeditions? A. He was to continue the same as he did to get information, that is generally up to the man's own idea that is working.

Q. Well, do you mean the plan was that he was to continue with this gang, Gladston, Loar, Hayes and others? A. His instructions were that he was to get us word before the robbery was committed, if he could, if not, to give us information as soon as he could after the robbery had been committed.

Q. Who was he to report this information to? A. Myself.

Q. Did you advise him as to how to reach you any time through the night or day? A. Through the telephone.

Q. Now, you say that if he learned that a robbery was to be staged or pulled off he was to notify you if possible? A. If possible, yes, sir.

Q. In advance, of where the robbery was to take place? A. Yes, sir.

Q. Now, you say, if it was possible, McCarthy was to give you this information in advance of the robbery? A. If he could, yes, sir.

Q. By "possible" do you mean if he could do that without letting the gang know he was giving the information? A. Why, he would have to use his own judgment about that. You see, we couldn't tell him how to use this information.

Q. Well, what I mean is this, of course— A. (interrupting) You mean, if he could give it to me before, so the gang wouldn't know it?

Q. Yes? A. Yes.

Q. To make myself clear, I mean this, if he knew the gang was going to pull off a robbery at Leavenworth, of course, he couldn't boldly go right to a telephone and in their presence call you up and say, "The gang are going to pull off a robbery at Leavenworth?" A. Yes, sir.

Q. But I understand he was to notify you, if he could, without tipping off the gang that he was giving notice? A. That is right.

Q. What did he say when you met him there at the Baltimore Hotel in reference to where this gang had been operating? A. Well, different places.

Q. Just name them. A. All right, Osawatomie, Kansas, Stillwell, Paola, Raytown, Missouri, Leavenworth, Kansas, Pleasant Hill, Missouri, he

may have said some other places, I don't just remember.

Q. What were the instructions given to McCarthy with respect to his going right along with the gang and at least pretending to participate in the robberies the same as the others? A. He was to continue as he was doing.

Q. As he had been doing, you mean? A. Yes, sir; as he had been doing.

Q. As to his ways and means and methods of securing this information for you with respect to who this gang was when they were robbing you and if they had robbed you, what became of the goods, you left that largely to the discretion of McCarthy? A. Yes, to furnish us the information.

Q. Now, after McCarthy was employed did he report for duty to you or to anybody else at any particular place each day or each week? A. At times he would call up on the 'phone when he wanted to give us any information.

Q. Who would he call, you? A. Yes, sir; call me.

Q. He didn't report to you each day in person? A. No, sir.

Q. I mean, he didn't show up at any particular place? A. No.

Q. Just called you from time to time on the telephone? A. Yes.

Q. As a rule would he call you each day? A. No, I don't think he would each day.

Q. He didn't punch a clock? A. No, sir; he did not.

Q. Were his reports to you all verbal, or were there some that were in writing? A. I don't know that—I don't think he ever wrote me out a report.

Q. Did McCarthy report to you at any time before David was killed with respect to any intended robberies or robberies that had actually taken place? A. He had.

Q. What information had he given you prior to the time David was killed with respect to activities of this gang of thieves? A. I remember one very well, that he reported to me that this gang was going to rob the train at Kenneth Tank, Kansas.

Q. What did he say, what was his report? A. He informed me that they were going to rob our train that night at Kenneth, made that report to me on 15th Street.

Q. In person? A. Yes, sir.

Q. And how long was that, about what time of day was that he gave you that report? A. It was about five o'clock in the afternoon.

Q. And what time did the train pass through Kenneth? A. Well, there are three or four of them pass through.

Q. Well, did he report which train they were on? A. We immediately went there with the men to cover that place.

Q. Did he tell you which train? A. No, he didn't say what train.

Q. Well, what train passed through there that night after five o'clock that might be robbed? A. There is No. 477, freight train.

Q. What hour did that go through? A. Well, you can't tell that.

Q. Approximately what hour was it due? A. They go through from ten o'clock to two o'clock in the morning, sixty-five, 61, and then there may be an extra.

Q. So a number of trains might go through there that night? A. Might go through that night.

Q. Upon receiving that information what did you do? A. We immediately got our men, got help from Paola, and covered this point all night.

Q. Did you also notify the train riders on these respective trains to be on the look-out? A. Yes, sir.

Q. Did you put on any extra train riders? A. That night we didn't. We didn't have them.

Q. But you warned them all? A. We warned them all.

Q. And in addition to that you had police officers covering the place where the robbery was expected to take place? A. Not that night.

Q. I thought you said you had some men go there that night? A. Our own men.

Q. What men did you have go? A. We had the special agent, C. M. Barber, and J. N. Blank.

Q. Who was he? A. A special officer.

Q. Yes. A. And John Parhan.

Q. Special officer? A. He is a lieutenant, and W. H. Boullt, myself.

Q. All employees of the railroad company? A. And a man by the name of Ollie Plant.

Q. All employees of the railroad company? A. Yes, sir.

Q. Did you all go there armed? A. We did.

Q. Did you instruct the train riders to go armed that night? A. No, I told them to look out, that we would be along at this place, to not pay any attention if they seen us there.

Q. You assumed when you told them to look out they would have sense enough to go armed? A. I thought so.

Q. Did the robbery take place, or attempted robbery? A. No, sir.

Q. Did McCarthy advise you later as to what had happened? A. He did.

Q. What did he say? A. He said they all got mixed up over in Argentine and decided it was too late to go out, the bunch did.

Q. Well, did he make any other report to you? A. Oh, he may have made several reports.

Q. Well, do you remember any other report that he made? A. No, I can't right off-handed, no I can't remember.

Q. Did he make any report to you in respect to any robberies that had actually taken place, and in which he didn't have an opportunity to notify you in advance? A. No, sir.

Q. How long did McCarthy continue in the employment of the railroad company under your department?

Mr. Hackney: As an informer?

Q. Yes, as an informer. A. As an informer, well, I think until about June, 1923.

Q. Where did he receive his pay check? A. He didn't receive any pay check.

Q. What did he get? A. Cash money.

Q. Who delivered it to him? A. I did.

Q. Each month? A. Yes, sir; or if he needed it before, I would get it to him.

Q. You would advance it? A. Yes, sir.

Q. But you paid him in cash? A. Paid him in cash, yes, sir.

Q. Was any voucher or draft drawn by the treasurer of the company, covering his salary that you would then cash? And turn the cash to him?

A. No, sir; no draft at all, or pay check or anything of the kind.

Q. What voucher or pay check did you sign to get this money? A. I didn't sign any voucher at all.

Q. From whom did you get the money? A. I got the money from R. S. Mitchell.

Q. Every month you would get the cash from Mr. Mitchell? A. I would, sir.

Q. How would the cash be transmitted to you? A. The cash would come to me in Mr. Mitchell's personal check for him and the other men, made payable to W. H. Boullt.

Q. Did you pay all your informers in that manner by paying them cash? A. I paid all men employed under me in that line of duty by cash.

Q. You say Mr. Mitchell would simply send you a check for the total amount? A. For the total amount.

Q. And then you would cash it? A. I would cash it.

Q. And deliver the cash to these men? A. Deliver the cash.

Q. Did you take any receipts from those men? A. Certainly, I did, I would protect myself.

Q. You took a receipt from McCarthy? A. I did.

Q. What did you do with those receipts? A. I sent them in to St. Louis to cover that check.

Q. To show the disbursement you made? A. Yes, sir.

Q. So that they were sent to Mr. Mitchell? A. Yes, sir.

Q. Do you remember the occasion on which Mr. David was killed at Leavenworth, Kansas? A. I think it was about two o'clock in the morning, the morning he was killed I got a telephone call.

Q. When had McCarthy last made any report to you either over the telephone, in writing, or verbally, or otherwise, prior to that time? A. Well, I just couldn't say just what date that was.

Q. Well, with that incident in your mind, can you say whether or not he had made any communication with you the day before? A. It might have been the day before or several days, might have been the day before he had a talk with me.

Q. What is your best recollection? A. Well, it might have been the day before he called me on the 'phone.

Q. Do you remember what he said to you at that time? A. No, I just can't remember what all he did have to say.

Q. I understand that this gang of thieves, or at least a considerable part of them had been attending the trial of the criminal case which, I think, Hoggy Ward was the defendant, the day before this incident at Leavenworth, the trial as it was being held at the District Court in Kansas City, Kansas, did McCarthy make any report to you in respect to the fact that the gang was there at that trial? A. I don't think he did.

Mr. Hackney: You mean you heard that afterwards?

A. Afterwards.

Q. (Mr. Talbert) Had McCarthy made any report to you of any kind at any time before this attempted robbery took place at Leavenworth, Kansas, in which David was killed? A. Oh, he had made reports.

Mr. Hackney: As I understand—about this contemplated robbery that night—

Mr. Talbert (interrupting): Read the question.

(Last question read by the notary.)

A. You mean intended robbery, before that?

Q. (Mr. Talbert) I mean in reference to that robbery. A. No, sir.

Q. So, if I understand you, McCarthy had made no report to you, or to anyone connected with the company, as far as you know in respect to the intention of the gang to rob your train at Leavenworth on the night of May 16th, or at the time David was killed? A. Or the morning of the 17th, no, sir, he had not.

Q. Had he to your knowledge made a report to any other person connected with the railroad company of such fact? A. No, sir.

Q. What train was it that David was a train rider on at the time of his death, what is the number of his train? A. Well, now, I just can't think—163 and 172 goes that way, and I just can't remember which train.

Q. Was it one of those trains? A. Yes.

Q. Either 163 or 172? A. Yes.

Q. Where did that particular train that David rode and was riding at the time of his death, where did it start from and what was its destination? A. It started from the east bottoms.

Q. Kansas City, Missouri? A. Kansas City Missouri, and his destination to ride that train was to Atchison, Kansas.

Q. What was the final terminus of that train? A. If it was one of those two trains, it may have been split up at Atchison, part of the merchan-

dise would go to St. Joe, part would go to Falls City, Nebraska, and part to Omaha, Nebraska, and some of it may go to Lincoln, Nebraska.

Q. How many train riders were riding that particular train? A. That night?

Q. Yes. A. That David was killed?

Q. Yes. A. Two.

Q. David was one and who was the other? A. Boyd was the other.

Q. What is his full name? A. I don't know his full name.

Q. B-o-y-d? A. Yes.

Q. Is he still with you? A. No, sir.

Q. Do you know where he is? A. No, sir; I do not.

Q. What was the first information you received from any source in respect to this attempted robbery at Leavenworth, in which David was killed? A. I was called at my residence, 5501 Woodland, and night sergeant Graham informed me that David had been shot at Leavenworth and he would be by with C. M. Barber, special agent, and he informed me, said he would be out in his car in a few minutes and drive to Leavenworth.

Q. Did he come and get you? A. He came out in company with Mr. Barber, special agent, Mr. Graham, night sergeant, Mr. John Parhan and we drove to Leavenworth.

Q. Who is Mr. Parhan? A. Sergeant then special agent.

Q. All men employed under you? A. Yes, sir.

Q. You did then drive to Leavenworth? A. Yes, sir.

Q. What did you find when you got there? A. We drove to the chief of police's office first.

Q. Go ahead and relate what you found, what took place? A. We called on Mr. Young, and we then went down to the scene of this killing, went over the ground, in company with Mr. Boyd, who was riding with train rider David and looked over the scene of the killing, went up over the hill, made all the investigation we could at that time, and then went back to the undertaker's establishment and talked to the undertaker. Then back to Chief Police Young's office.

Q. Describe as best you can the exact location of the place where the killing took place? A. Well, that was in the south Leavenworth yards where there is a very steep bank on the west side, and east—southeast, oh, I guess two hundred yards or more, as near as I could tell there is a high bank there where there had been some cinders dumped out from a mine, and I guess a quarter of a mile further there was a stream running east and northwest, a tressle over that.

Q. Was David dead when you arrived? A. He was.

Q. Do you know how long he lived after he was shot? A. I do not.

Q. Did you examine his body to see where he had been struck by a bullet? A. No, sir.

Q. Did he have any fire-arms on his person at the time he was killed. A. I didn't see any.

(The following three questions were withdrawn and not read by plaintiff's counsel.)

Q. Did you learn whether or not he had? A. Yes, I heard he had.

Q. What fire-arms did he have? A. He had a .45 automatic Colts and he had a sawed-off shot gun.

Q. Do you know to whom these fire-arms belonged, whose property they were? A. The pistol was his, I suppose the shotgun belonged to the railroad company.

(Reading of deposition resumed.)

Q. When did you first receive any report or information from McCarthy in respect to this robbery? A. The next morning.

Q. What time? A. Probably between seven and eight o'clock, might have been seven o'clock.

Q. And where were you when you received this information? A. I was in Leavenworth, Kansas.

Q. How did you talk with McCarthy? A. I talked over the 'phone to Mr. H. K. Lewers, special officer in my office, and then later talked to McCarthy, just while he was there.

Q. McCarthy was then in your office and you were in Leavenworth? A. Yes, sir.

Q. Did you later have any further conversation with McCarthy? A. I did.

Q. Where? A. Kansas City, Missouri.

Q. At your office? A. Yes, sir.

Q. What report did McCarthy make to you in respect to this robbery or attempted robbery? A. He gave me all the information on who killed David, how it happened, and he went to Leavenworth with me to make the report to Mr. McNaughton, the county attorney.

Q. What information did he give you as to who the gang was, where they started from, where

it was organized and when the robbery was planned? A. It started at Kansas City, they drove to Leavenworth in Lawrence Hayes' car, Bert Gladston, Red Loar, Lawrence Hayes and McCarthy.

Q. What did McCarthy say with respect to whether he went over from the automobile to the train armed with a gun or crowbar or other implements? A. He said he was given a gun by Bert Gladston and they went over.

Q. He carried that gun? A. Yes, sir.

(The following questions were by the plaintiff's counsel withdrawn and not read to the jury.)

Q. And what did McCarthy tell you in respect to when they had arranged or planned this robbery? A. That afternoon very late, that they were riding down Minnesota Avenue and they were near the bluff, near the C. G. W. Bridge and seen a train coming over to Atchison and Lawrence Hayes made the remark, he says, "there is a good train, let's make it," and they went back up the street—

Q. (interrupting) Who all was in the gang at that time, did he say? A. Lawrence Hayes, McCarthy and some other fellow, I forgot his name, there was three of them in it, they went back up the street and picked up Bert Gladston, and then they got Red Loar, then they drove up to a drug store and McCarthy got out and went in and tried to get a telephone to call me. Then this bunch came in on him and that time he bought a rubber doll—I won't say a rubber doll, a doll for his baby to throw them off, then he wanted to go

home to change his clothes in order to get to call me, but they wouldn't let him do it.

Q. About what hour in the afternoon did he say it was when Lawrence Hayes suggested that they make that train? A. I couldn't tell you exactly, the train was coming across the Kaw River then, they had been riding around together over in Kansas.

Q. Did he say about what hour that was when that occurred? A. No, he didn't just exactly say what hour.

Q. Did he say he had made any other attempts to communicate with you before this robbery was pulled off? A. He said he did not have any other chance to do it, only two attempts, he made when he went into the drug store and then tried to get them to let him go home and change his clothes.

(Reading of deposition resumed.)

Q. Where was McCarthy living at that time, do you know where his residence was? A. I believe he was living with his wife's folks, I don't remember the number, I don't know whether it was on Twelfth Street or not, no,—that is his mother lives there on Twelfth and Park, somewhere out there.

Q. On the Missouri side? A. On the Missouri side, yes sir.

Q. Do you know what became of McCarthy after he quit working for the railroad company as an informer? A. Well, I have seen him around town here, I don't know exactly where he is now.

Q. Well, do you know who he went to work for after he left the railroad company? A. No, I don't know who he went to work for.

Q. Is his mother living? A. Yes, sir.

Q. Is his father living? A. I think his step-father is, I don't know whether it is his father or not.

Q. Do you know his mother's present name? A. I think it is Mrs. Ella McCarthy.

Q. If he has a step-father it probably wouldn't be. A. Yes, he has a step-father, either his step-father or his father, I don't know.

Q. Do you know where she lives, you spoke of Twelfth and Park? A. Well, now, she may live there, I don't know.

Q. Has McCarthy any family? A. A wife and little girl.

Q. Do you know whether or not McCarthy was finally pardoned by Governor Davis from the conviction for stealing from your cars at Atchison? A. Pardoned by Governor Davis?

Q. Yes. A. I don't think he was.

Q. Was it your understanding that he was convicted and that the Supreme Court affirmed his sentence? A. I think so.

Q. Do you know why he didn't serve time? A. I think he was paroled.

Q. Who paroled him? A. I think the judge paroled him from the bench.

Q. Do you know that to be the fact? A. I think so.

Q. Who was he paroled to, do you know? A. I do not know.

Q. Do you know the length of his parole, the terms of it? A. I think it was two and a half years, I wouldn't state positive, but that is my best knowledge.

Q. Did you have anything to do with securing a parole for him? A. No, sir, I never spoke to the judge.

Q. Did you recommend a parole? A. I didn't go up and talk to the judge, I may have said I would like to see him paroled, I didn't go up there.

Q. I mean, did you sign any application? A. No, sir, I signed no application.

Q. Did anybody else, on behalf of the railroad company, to your knowledge? A. I don't know.

Q. You were interested in getting him paroled, were you? A. I was interested in this way, that he assisted in getting the biggest bunch of thieves and bank robbers and murderers, the man who had formerly shot our special agent, Fred Conklin, at Osawatomie, and we had the two men, Gladston and Loar in penitentiary, and I thought he deserved some credit for his good work.

Q. Did McCarthy assist you in apprehending any other thieves, other than Gladston, Loar and Hayes? A. No, not that I know of.

Q. Did McCarthy make reports to anybody else connected with the railroad company other than yourself? A. No, sir.

Q. He was directed to report to you? A. To me.

Q. He didn't make reports to Mr. Barber, did he? A. He may have talked to him sometime,

but I don't think he did, unless I was out on the road.

Q. If you were here, his instructions were to report to you? A. To report to me, yes, sir.

Q. As I understand you, McCarthy was not to report an intended robbery to you unless he could do it without letting the gang know that he was so reporting? A. Not uncovering himself, no.

Q. That is right, isn't it? A. Yes, sir, so he wouldn't uncover himself.

Q. So they wouldn't get on? A. Yes.

Q. Was McCarthy instructed to instigate any robberies in order to lead the gang into a trap? A. No, sir.

Q. Do you know of any expeditions on which McCarthy accompanied this gang of thieves other than the time when they went to Leavenworth? A. No, sir.

Q. Did he ever report to you having accompanied these thieves on any other expedition after his employment? A. No, sir, I don't think he did.

Q. At the time you employed McCarthy did you know that he was being charged with having killed a policeman in Kansas City, Missouri, by the name of Fitzgibbons? A. I never heard that name.

Q. Or any similar name? A. No, sir.

Q. Well, did you know he was being charged with having killed anybody? A. At that time?

Q. Yes. A. No, sir.

Q. When did you first learn that? A. After he testified at the preliminary hearing at Leavenworth, Kansas.

Mr. Hackney: That is the preliminary of this gang?

A. Bert Gladston and Lawrence Hayes and Red Loar.

Q. Don't you know that McCarthy was fired off the police force of Kansas City, Missouri, for shaking down bootleggers? A. What time do you mean?

Q. At any time? A. Before this killing?

Q. Or since, or any time? A. I heard afterwards.

Q. You heard him so testify at the time of the trial? A. I heard him and Lawrence Hayes and Loar.

Q. He admitted it while he was testifying? A. Yes, sir.

Q. After McCarthy was employed over at the Baltimore Hotel, did you give him any further instructions at any time in respect to the nature of his work? A. No, sir, he was to inform us, we talked to him, if he would give us any information as to where the robberies were going to be committed, then we was to use our judgment.

Q. Did you give him the names of any persons you were suspecting and tell him to try to get the confidence of such persons and ascertain what they were doing? A. No, sir.

Q. Where did McCarthy say he and the gang had supper that night before they went to Leavenworth? A. I don't remember if he said, he may have said—I may have heard him at the trial of Gladston, Loar and Hayes at Leavenworth, he may have testified that, but I don't remember.

Q. Had any warnings or instructions been issued to Boyd and David to be on the look-out for thieves at Leavenworth the night David was killed? A. That night?

Q. Yes. A. That same night.

Q. Yes. A. I hadn't issued, I had had instructions issued previous to that.

Q. What instructions had been issued previous to that? A. Instructions had been issued to all train riders on account of having so many robberies, to be on the look-out for robberies and be able to protect themselves, by all means not to get hurt, if they could prevent it.

Q. Had any warning or information been given David or Boyd of this particular intended robbery at Leavenworth, Kansas? A. The night David was killed?

Q. The night David was killed. A. I had no information that there was going to be one and there was no reason why we should give them one that night.

Q. So, you didn't give— A. (interrupting) They had general instructions at all times.

Q. I say, so you didn't give them any particular instructions that night? A. I didn't have any information.

(The following two questions were by plaintiff's counsel withdrawn and not read to the jury.)

Q. McCarthy's excuse to you for not having notified you was that he didn't get an opportunity to do it, because the gang followed him up into the drug store? A. I don't know whether he said it was an excuse, that is what he told me why he didn't notify me.

Q. That is, he couldn't give you the information without frustrating the hold-up or the robbery? A. Without being killed.

(Reading of deposition resumed.)

Q. Is that right? A. Yes, sir; they did.

Mr. Talbert: Read the question.

(Last question read by the notary.)

A. No, sir. And he was afraid to do it.

Mr. Talbert: I believe that is all.

Mr. Hackney: That is all.

At the conclusion of the reading of said deposition by plaintiff's counsel, with the exception of the parts aforesaid, counsel for defendant offered in evidence those parts of said deposition withdrawn by plaintiff's counsel aforesaid. Plaintiff objected to the reading of said parts of said deposition, and this objection was sustained by the court and those parts of said deposition were excluded. To which action and decision of the court in excluding said parts of said deposition, the defendants then and there and at the time duly excepted.

GEORGE A. LOCK, being called as a witness on behalf of the plaintiff testified as follows, to-wit:

Direct Examination by Mr. Freet.

Q. Mr. Lock, will you state your name? A. George A. Lock.

Q. What is your business, Mr. Lock? A. Life insurance.

Q. You are one of the general agents for the Fidelity Mutual Life Insurance Company here in Kansas City? A. I am.

Q. How long have you been? A. Twenty years.

Q. At my request, did you bring with you the American Mortality Experience Tables? A. I did.

Q. Have you it in your hand? A. I have.

Mr. Freet: I will introduce the table in evidence and have Mr. Lock give the age, date and days.

Mr. Lock: According to that table, attending the expectancy of life, of a man forty-two years of age?

Q. Forty-two years of age? A. Yes, sir.

Q. You may state the average of the life? A. That is twenty-six years and seventy-two one hundredths.

Q. Now, what would be the expectancy of life of a woman thirty-seven years of age—make it thirty-eight instead of thirty-seven? A. 29.62.

(Witness excused.)

Plaintiff offers in evidence the deposition of Albert Charles Gladson, taken October 30th, 1925 in the State Penitentiary of Lansing, Kansas, and the defendant offers in evidence the exhibits attached thereto, all of which is admitted in evidence as follows:

ALBERT CHARLES GLADSON, of lawful age, produced, sworn and examined as a witness on behalf of plaintiff herein, deposeth and saith:

Direct Examination by Mr. Talbert.

Q. State your full name? A. Albert Charles Gladson.

Q. What is your age? A. Twenty-four.

Q. You are now a prisoner in the State Penitentiary at Lansing, Kansas? A. Yes, sir.

Q. Where did you live before you were sent to this prison? A. 830 South Thirteenth Street, Kansas City, Kansas.

Q. Are you acquainted with a man by the name of Harry McCarthy? A. Yes, sir.

Q. Do you remember the occasion on which a man by the name of James Lee David, a train rider for the Missouri Pacific Railroad Company was killed at Leavenworth, Kansas? A. Yes, sir.

Q. Do you recall that that occurred about one-thirty A. M. on May 17, 1923? A. Yes, sir.

Q. Where were you the day before that, that is the day before this date on which James Lee David was killed? A. Why, most of the day we was waiting for a trial—Hogie Ward's trial up on Minnesota Avenue, Hutchinson's Court.

Q. That trial was taking place in the court of Judge Hutchinson in Kansas City, Kansas? A. Yes, sir.

Q. Were you attending the trial merely as a spectator? A. Spectator.

Q. What other persons attended that trial that you know? A. I couldn't—George Riley, Johnny Rock, Earl Gladson, Lawrence Hayes, Harry McCarthy, Ray Braynard—oh, there was numerous others, but I don't know just exactly who.

Q. On what charge was Hogie Ward being tried? A. Payroll holdup, Wilson & Company.

Q. Now, this trial of Hogie Ward's which you attended, as I understand you, took place

the day before the night on which David was killed, is that right? A. Yes, sir.

Q. During that trial, just state whether or not you had any conversation with Harry McCarthy in respect to robbing box cars of the Missouri Pacific Railroad Company at Leavenworth, Kansas? A. What do you mean?

Mr. Talbert: Read the question.

(Question read by the reporter.)

A. Yes, we had intention of coming up and robbing box cars that night.

Q. When did you first have any conversation with McCarthy in respect to that matter, what time that day, in the morning or at noon or in the afternoon or at night, or when? A. Along at noon.

Q. About noon of that day? A. Yes, sir.

Q. State whether or not any plan or arrangement was made at noon of that day, that is the day before the night on which David was killed, in respect to coming to Leavenworth, Kansas, to rob the freight train of the Missouri Pacific Railroad Company? A. Why, all the boys what belonged to the gang were supposed to go down to Riley's house right after the trial, meet down there.

Q. And then what was to be done? A. Then they was going to make arrangements, try to get two cars to come up, some of the boys didn't want to come up.

Q. When, in reference to noon the day before David was killed was it that the plan of coming to Leavenworth to rob the cars of the Missouri Pacific was definitely made? A. Why, it was out in front of the court room.

Q. About what time in reference to noon that day? A. It was during noon hour.

Q. If I understand you correctly, during the noon hour of the day before the night on which David was killed, this plan to come to Leavenworth, Kansas, and rob the freight cars of the Missouri Pacific Railroad Company was agreed upon? A. Yes, sir.

Q. Between what persons was that plan agreed upon? A. Why, several of the gang, me and Harry McCarthy and Lawrence Hayes and—let's see—Johnny Rock, Charlie Masterson, that is all I can recollect right now.

Q. Who was the leader in making the arrangement for this robbery of the Missouri Pacific at Leavenworth, if there was any leader?

Mr. Hackney: I object to the question as leading and suggestive.

Mr. Talbert: Let the question be withdrawn.

Q. Who first consulted you, if anyone, in respect to coming to Leavenworth that night to rob the train of the Missouri Pacific Railroad Company? A. Why, it came up in a conversation, McCarthy wanted some money for an appeal of some kind of case the Missouri Pacific had against him and he suggested that we all go up and rob some cars.

Q. Who suggested that? A. McCarthy.

Q. For what purpose? A. To get himself out of that case, an appeal bond he wanted, or something of that kind, I think it was for funds to fight his case, or something.

Q. Do you know whether or not McCarthy at that time had been convicted of any criminal

offense? A. Yes, he had been convicted of several at that time.

Q. I mean, you speak of some case that was then pending, what case was that? A. A case of the Missouri Pacific against him, that he had been already convicted in.

Q. You mean for robbing the train of the Missouri Pacific? A. Attempting to rob the Missouri Pacific.

Q. This case you refer to, was that case at that time pending in the Supreme Court? A. Yes, sir.

Q. Now, you say McCarthy was wanting to raise funds to take care of his appeal? A. To take care of his appeal, and I don't know what else.

Q. I understood you to testify that this plan of a gang, as you call them, these men you have mentioned, of coming to Leavenworth to rob box cars that night, I mean the night following the day on which this trial took place, was made about noon of that day? A. Along in the noon hour, yes.

Q. I believe you testified that David was killed about one-thirty, A. M., on May 17, 1923, did you not? A. Yes, sir.

Q. So that this trial, this Hogie Ward trial you have spoken of, it took place the day before it would have been May 16, 1923, is that correct? A. That is correct.

Q. What particular train of the Missouri Pacific Railroad Company was it the intention of you and the other men in this gang to rob that night, that is the night of May 16, 1923? A. Well,

there is special trains that carry cigarettes mostly, some of them go to St. Joe, and I don't know where all else they go, they mostly carry cigarettes, we were intending to get that one.

Q. Where did this train you were intending to rob, where did it start from? A. Start from—I don't know where.

Q. I don't mean what street address, but did it start from Kansas City, or some other place? A. Kansas City.

Q. Was it expected to pass through Leavenworth, Kansas? A. It stops there.

Q. And was it at Leavenworth, Kansas, where you expected the robbery to take place? A. Yes, sir.

Q. What time did you leave the court room that afternoon, that is the afternoon of May 16, 1923, what time did you leave the court room of Judge Hutchinson? A. Along about six o'clock in the evening.

Q. Who was with you when you left the court room? A. Why, I just don't remember, but there was two carloads of us, we all went down to Riley's house, I don't remember just who was in the cars.

Q. Who was the driver of the two cars? A. Lawrence Hayes was the driver of one and George Riley was the driver of the other.

Q. And where did you go to? A. To George Riley's home.

Q. Where was that located? A. South Coy Street, Kansas City, Kansas.

Q. In what is known as Armourdale? A. Yes.

Q. What was done, if anything, in furtherance of this plan to come to Leavenworth, Kansas, and rob the freight cars of the Missouri Pacific Railroad Company? A. Why, we consulted, all of us down there, and some of them didn't want to go, so who did want to go, it was I and McCarthy and Lawrence Hayes and Charles Masterson, four of us started and made it up to go that night.

Q. About what time was that? A. About six-thirty, or something like that.

Q. Six-thirty P. M., you mean? A. In the evening.

Q. Then what did you do? A. I had a date with a girl that night, so I wanted to go up and see and put it off and Charlie Masterson had to go to see the doctor, so Lawrence Hayes and McCarthy and I and Masterson went up to Wyandotte and I got off at Tenth and Central and Masterson went on up to the doctor's office, so I made a date with him to meet me as he was going back.

Q. Made a date with who? A. Lawrence Hayes and McCarthy.

Q. To meet you where? A. At Tenth and Central.

Q. Where were they going? A. To the doctor's office and then go down to see this freight go through and see what was on it.

Q. Where did they say they were going to see the freight, to what street or crossing? A. It foots there at Third and Minnesota.

Q. What was the purpose of going down to see the train as it went through? A. Why, mostly to see if there was any good merchandise on it.

Q. When did you next see McCarthy and Lawrence Hayes? A. I don't remember just what time it was, I think it was nine o'clock that day.

Q. Where did you meet them at that time? A. Tenth and Minnesota.

Q. Who was with them, if anyone? A. Just McCarthy and Lawrence Hayes.

Q. What was done then? A. We wanted another man, so we went down and got Red Loar out of his home.

Q. Is his full name Nathan Loar? A. Nathan Loar.

Q. Where was he living at that time? A. On South Fifth Street, Armourdale, he was in bed at the time.

Q. When you got down to Loar's house, what was done, if anything in respect to getting him to go with you? A. Well, all the lights was out and McCarthy got out of the car and went up on the porch and asked for Red and Red come out and got in the car.

Q. Then what was done? A. They started out and went up to my home, 830 South Thirteenth Street.

Q. From your home where did you go? A. Straight to Leavenworth.

Q. About what time did you arrive at Leavenworth? A. Oh, it must have been twelve or twelve-thirty, something like that, around twelve o'clock at night, I know.

Q. Around midnight? A. Yes, around midnight.

Q. Was this freight train, had it arrived at Leavenworth yet when you got here? A. No.

Q. I mean when you got to Leavenworth? A. No.

Q. Did you wait for it? A. Yes.

Q. Who all was in the party when you arrived at Leavenworth, Kansas? A. Lawrence Hayes, Harry McCarthy and Nathan Loar and Bert Gladson.

Q. That is yourself? A. Yes.

Q. In what part of Leavenworth did you wait for the train? A. I guess it is southeast.

Q. What? A. Leavenworth, the southeast part.

Q. About how far was that where you stopped your car from the track which this train came in on? A. About a block, a city block.

Q. How long did you wait for the train? A. Oh, we must have waited an hour or an hour and a half.

Q. When the train came in what was done? A. What do you mean, "what was done"?

Q. Well, did you—you said the train hadn't arrived when you stopped your automobile, I believe, and you waited about an hour and a half for it, is that right? A. Yes, sir.

Q. Well, when the train came in, what was done, if anything towards carrying out your plan and purpose of robbing the train? A. Why, McCarthy and I and Red Loar got out of the car and McCarthy and I went over to the railroad track and hopped on the train and went on down in the yards, the train stopped down there.

Q. What was your plan in respect to robbing this train? How were you going to get into the

freight cars? A. Why, McCarthy had an iron bar to get into the freight cars, a pinch bar.

Q. Commonly known as a pinch bar? A. Yes, sir.

Q. Were both you and McCarthy armed with firearms? A. Yes, sir.

Q. How long had you known this McCarthy prior to the time you came to Leavenworth with him? A. I had know him for ten years.

Q. Had you ever robbed freight cars with McCarthy at any time before this trip to Leavenworth, Kansas? A. Yes, several times.

Q. Just state where and on wlfat occasions you had robbed the cars with McCarthy, as nearly as you can remember? A. Why, one time was at Wolcott, Kansas, we robbed the Missouri Pacific, held up the train of cars.

Q. How long was that before this trip to Leavenworth? A. That was inside of a month of the time.

Q. About a month before? A. Well, it was in that time, I don't know just when it was.

Q. What other robberies have you taken part in in which McCarthy took a part? A. We robbed a Santa Fe freight train at Turner, Kansas, of some shoes and we robbed the Kansas City Terminal at Boeke—and I don't know what it is, South Boeke Street.

Q. Kansas City, Kansas? A. Yes, Armourdale—of a bunch of shoes. And then the Union Pacific at Mill Street in Armourdale, we robbed it.

Q. Had McCarthy, to your knowledge, ever served any time in prison? A. Yes, he served

under Charlie Masterson, alias Charlie Masterson, he served a term.

Q. Where? A. I am pretty sure it was Minnesota, I am not sure, I knew he done time.

Q. You spoke about the fact that McCarthy had been convicted for robbing the freight cars of the Missouri Pacific Railroad Company and his appeal was pending in the Supreme Court at the very time you came here to Leavenworth, do you know at what place he had robbed the Missouri Pacific, at what town? A. It was Atchison, supposed to be.

Q. Atchison, Kansas? A. Yes, sir.

Mr. Hackney: You say you supposed?

A. It was attempt, I think was what they convicted him on.

Mr. Talbert: You may inquire.

Cross Examination by Mr. Hackney.

Q. Do you remember testifying in the trial of Red Loar about the 11th of June, 1923, in the District Court of Leavenworth County, Kansas, when he was charged with participating in this killing of David? A. Yes.

Q. You remember testifying there on that occasion, do you? A. Yes, sir.

Q. Did you testify also when Hayes was tried? A. I never testified in Red Loar's trial, I testified in Hayes.

Q. Well, didn't you testify on the 11th day of June, 1923, in the trial of Red Loar either before the Magistrate or the District Court, do you remember that where Mr. Thompson was attorney for Red Loar—do you remember that? A. I don't remember testifying for Red Loar, at all.

Q. Let me refresh your recollection. A. I believe it is Hayes, because Red you know, Red didn't have no defense at all.

Q. Did you testify at the Hayes trial? A. Yes, I testified at the Hayes trial.

Q. Did you testify at your own trial? A. Yes, sir.

Q. Now, then, on the 11th day of June, 1923, didn't you testify in one of those cases either of Red Loar's or Hayes or of your own, in substance as I will read to you? Wasn't this question asked you and wasn't this answer given?

"Q. Mr. Gladson, how long have you known this man McCarthy? A. Known him for about two months.

Q. About two months? A. Yes, sir."

You remember that?

Q. You don't remember testifying to that? A. No, I don't. I remember that answer, I remember that question all right, but I don't remember the answer.

Q. Now, didn't you further testify on that occasion?

"Q. On the 16th day of May, what time did you see McCarthy that day?"

Didn't you answer: "A. Seen him around noon up at the District Court, Kansas City, Kansas."

Q. Do you remember making that statement? A. Yes.

Q. Now, then, do you remember making this further statement, I will read further from the deposition.

"Q. Did you leave there with him? A. I did not.

Q. When did you first see him that night? A. I seen him down at Riley's house, 1016 South Coy Street."

Q. Did you answer that question that way?

A. Read that over, please.

(Question read by counsel.)

A. What time did I see him down there you say?

Q. When did you first see him that night was the question, didn't you testify, didn't you make that answer? Then the next question:

"Q. What time did you go down to Riley's house? A. About six-fifteen."

Q. Did you make that answer? A. That six-fifteen is right, that is the first time in the evening.

Q. Then, further on, I will ask you if these questions were asked you and these answers given. "Q. Was he there at the time you got there, do you remember? "A. Yes, I believe he was. "Q. What time did you leave there? "A. It must have been close to seven o'clock. "Q. Who did you leave with? "A. With Lawrence Hayes and Harry McCarthy, Charlie Masterson and myself. "Q. Where did you go? "A. I asked Lawrence Hayes to take me to Tenth and Central. When we got up there I said, 'let me out at Tenth and Central.' I had a date with a girl up there. He drove up there and let me out." Do you remember making those statements?

Q. "Q. Was there any arrangement at that time made to meet them again? "A. No, there was not."

Q. I will ask you then if this next question wasn't asked and didn't you make this answer? "Q. When did you next see any of the party? "A. It was close around nine-thirty. I seen—I was waiting for a Tenth and Central Street car going to Armourdale and I seen Lawrence Hayes and Harry McCarthy coming along in his car. Harry McCarthy said, 'There is Bert; you might as well get in.' I got in and went down to Armourdale with them." Do you remember making that statement?

Q. Did you so testify? A. I remember making some kind of a statement that way.

Q. I will read the next question and the next answer. Wasn't this question asked and wasn't this answer given, "Q. Up to that time had there been anything said about a box car robbery? "A. There was not."

A. I don't remember.

Q. You don't remember making that? Then wasn't this question asked you and didn't you make this answer: "Q. Was there anything said at that time? "A. Well, yes, McCarthy says he and somebody else went down to Third and Minnesota, and they seen a freight going out. They got it in their heads to go and make it." Did you make that answer to that question?

A. Read that over again, please.

Q. "Q. Was there anything said at that time? That is the question by Mr. Thompson. "A. Well, yes; McCarthy says he and somebody else went down to Third and Minnesota, and they seen a freight going out. They got it in their heads to go and make it."

A. There was some kind of question, something about a freight train.

Q. And you made that answer to that question, didn't you? A. Yes, sir.

Q. "Q. Got in their heads to do what? "A. To go up and make that freight train." You made that answer to that question, didn't you?

A. Yes, sir.

Q. "Q. All right, what did they say to you, did they ask you, want you to go along? "A. McCarthy asked me if I wanted to go along."

Q. Did you make that answer? A. Just a minute, is that my testimony?

Q. Yes, that is your testimony from the court stenographer, what I am reading from. A. Yes.

Q. You made that answer, did you? A. Yes.

Q. Then, didn't also the attorney, Mr. Thompson, ask you the next question.

Q. (Mr. Hackney) Wasn't this question asked and this answer given: "Q. What did you tell him? "A. I told him, 'Anything was good enough for him was good enough for me.'" Did you make that answer to that question?

Mr. Talbert: I object to the question as being an improper method of cross examination.

A. Yes, sir.

Q. You made that answer. What is your recollection now about your testifying as I have asked you, that you had no arrangement to go and rob a Missouri Pacific box car, or any other box car until that night after nine-thirty, and when you said McCarthy said he and someone saw a train there at Third and Minnesota?

Q. What is your recollection now? A. Why, we had intentions at noon of going up to Leavenworth.

Q. To rob any particular train? A. Why, most generally get the best merchandise train there about one-thirty in the morning.

Q. But you hadn't any intention at the trial of robbing any particular train?

Mr. Talbert: I object to the question, the witness having already testified that he did have an intention of robbing a Missouri Pacific train and the plan was made at noon.

Q. What do you say now? A. I don't remember.

Q. You don't remember about your testimony or what the facts was at that time?

Mr. Talbert: What is the question?

Q. I say, now after reading your testimony, what do you say about whether or not your testimony then was correct, or whether it is correct today?

Mr. Talbert: I object to the question as being an improper method of cross examination, the witness already having testified on that matter, it being repetition.

A. I don't remember that question.

Q. Don't you know that was in substance your testimony on each of those times when you testified in that trial of yourself or either of those other parties charged with you in the commission of that crime?

Mr. Talbert: I object to the question as being repetition.

Q. What do you say? A. I don't remember that question.

Q. Now, then you remember also on cross examination by Mr. Bond that you testified in each of those cases, do you not, do you remember that? A. Do I remember Mr. Bond's question?

Q. Do you remember testifying on cross examination, after Mr. Thompson examined you?

Mr. Talbert: In which case?

Q. In the Red Loar case and in the Hayes case and also in your own case? A. I didn't testify in Loar's case, I testified in Lawrence Hayes' case and myself.

Q. Well, the records show you testified in Red Loar's case. A. I reckon it must be wrong, there was no defense in Red's case.

Q. In the testimony you gave at Leavenworth, when you did testify on behalf of one of your co-defendants, didn't you say that you had no plan to rob any car, but that McCarthy had told you he was a railroad bull and he decided to go up there and wanted you to go with him to this railroad car where the riders were and he would show you that he was a railroad bull?

Mr. Talbert: I object to the question, because the alleged statement is not shown to the witness and it is not identified what trial this statement was made in.

A. I don't remember the question.

Mr. Talbert: And there is no showing that the paper the attorney is reading from is an authentic copy.

Q. What do you say about that question? A. I don't remember.

Q. Don't you remember Mr. Thompson on direct examination asked you the question about

what McCarthy said, and didn't you testify in answer to his question, state what they said, you said: "A. * * * Harry McCarthy said, 'I am a railroad bull' he said, 'Come on, I will make you fellows rich.' He said, 'Come on.' The three of us finally said, 'We ain't going with you, you are a dope user.' " Did you make that answer?

Q. (Mr. Hackney) You don't remember that? A. No.

Q. You don't remember saying that McCarthy said that he was a railroad bull and that if you would go down there he would show you? A. I don't remember that question.

Q. You don't remember that? Who has talked with you since you were convicted?

Mr. Talbert: I object to the question as being too general, about what?

Q. About this matter, the circumstances of the shooting of David. A. Why, nobody I know of.

Q. Haven't you ever talked to anybody at all? A. Why not specially about that matter, no.

Q. Didn't you tell the officers when you were arrested, when you were first asked to make a statement, that you had no plan to go and rob the car until after nine-thirty that night?

Mr. Talbert: What officers do you refer to?

Q. The officers that arrested him and had him in custody? A. I didn't tell no officers nothing.

Q. Didn't you tell them anything? A. No, sir.

Q. Weren't you asked by the officers that arrested you what occurred? A. Well, I may have been asked, but I didn't tell them nothing.

Q. Do you remember when and where you were arrested? A. Yes.

Q. Where were you taken from the place of the arrest? A. Charlie Thompson's, lawyer's office.

Q. Taken to Thompson's office after you were arrested? A. I was arrested in Thompson's office.

Q. Then you came to Leavenworth with him, did you not? A. No, went to the City Hall, Kansas City, Kansas, and the Leavenworth officers came down and brought me to Leavenworth.

Q. Then, you were taken before the magistrate at Leavenworth, were you not? A. Yes.

Q. When were you taken there, the 11th day of June? A. I don't remember, I believe it was in May.

Q. Well, it was about a month, was it the next day after the hearing, I mean the next day after the killing, or was it a month after? A. No, it wasn't the next day, it was several days after.

Q. It was several weeks after David was killed before the preliminary hearing was had? A. Several days, it wasn't several weeks.

Q. And how many times did you testify before the magistrate? A. What magistrate?

Q. The committing magistrate here that bound over all of you boys? A. We never testified.

Q. Didn't you testify up there? A. No.

Q. How long was it before you and Hayes and Loar were tried in the District Court? A. From May 19th up to June 8th, when I got my time.

Q. June 11th was when Red Loar or Hays was tried, wasn't it? A. Along about the 11th.

Q. You say you didn't testify in the Magistrate's Court? A. No.

Q. But you did testify in the District Court? A. Yes.

Q. Which one of the boys was tried first? A. I was.

Q. You were tried first and you testified then in your own behalf, did you not? A. Yes.

Q. Then, who was tried next? A. Lawrence Hayes.

Q. And you testified in Hayes' case? A. Yes.

Q. You were tried about the 8th, were you not? A. I think it was the 7th and 8th.

Q. And Lawrence Hayes was tried about the 11th of June? A. Along about that time.

Q. And you say Red Loar wasn't tried? A. Yes, he was tried after that.

Q. How long after? A. About a couple of days.

Q. You didn't testify at Red Loar's trial? A. No.

Q. I will ask you to take this document which I now present to you and look at pages 1 to 42 inclusive and look it over and I will ask you if that isn't a correct report of the testimony that you gave and of the questions that were asked you on the trial in the District Court of Lawrence Hayes.

Q. Look over it, any part you want to, and answer the question, you can take your time and look it all through if you want to. A. All I can say is—

Q. (interrupting) I will ask you then, if you don't know what to say, to look over the deposition and state if you didn't testify as it is there reported and indicated on the question of when you first arranged to go to Leavenworth with a view of robbing box cars?

Q. (Mr. Hackney) In view of the objections made by counsel, I will call your attention to the part of the transcript of the testimony where you are inquired of as to your knowledge of McCarthy's and your arrangements that night and when you made your arrangement to go and rob box cars; it commences on page 3, goes on page 4 and page 5 and up to the top of page 6. Just read those and see if that isn't the way you testified.

Q. (Mr. Hackney) Just take your time and read it over, Bert, those pages 3, 4, 5 and 6 and see if that isn't the way you testified on that subject?

A. All I can say to this is I remember some of the questions, some of them are right, others I don't remember.

Q. Do you remember that part that you said you had no plan of robbing box cars before nine-thirty that night?

Q. (Mr. Hackney) What do you say now after refreshing your memory there? A. I don't remember.

Q. Now, then how many times have you been in the penitentiary? A. This is my—I was in the Missouri penitentiary, and this one.

Q. When were you convicted and sent to the Missouri penitentiary? A. In 1920.

Q. On what offense? A. For stealing some shoes from the Milwaukee freight house.

Q. Out of Milwaukee and St. Paul? A. Yes.

Q. How long a time were you sent to the penitentiary for that? A. Two years.

Q. Did you serve your term? A. Yes, sir.

Q. You were convicted at Osawatomie, Kansas, for shooting some man, were you not? A. No, I was convicted at Paola.

Q. At Paola, I should have said, for shooting at Osawatomie, did you serve your time for that? A. No, I was out on appeal bond.

Q. You were out on appeal bond when you were convicted for this offense and sent over here, were you not? A. Yes, sir.

Q. And your conviction for this case was for how long, what was your sentence for this conviction? A. Life.

Q. I asked you awhile ago if you had been convicted and given a sentence of ten years for that case at Paola, Kansas, had you not? A. Yes, sir.

Q. I asked you awhile ago about talks you had had with anybody about the circumstances on which you and McCarty came to Leavenworth on this night in question when did you first talk with anybody after you came here, any outsider? A. I have talked to my mother all along.

Q. Have you had any letters from anybody? A. No.

Q. Have you written any letters to anybody on the subject? A. No.

Q. Have you made any signed statement to anybody? A. No.

Q. Have you been requested to make statements to anybody? A. Not up to this time.

Q. When did you first talk to Mr. Talbert? A. Why, when did I first talk to him?

Q. Yes, the first conversation you had on this subject? A. This morning.

Q. Did you ever see him before? A. Yes, I have seen him over in Missouri, several times.

Q. Have visits with him? A. No.

Q. Have any conversation with him? A. No.

Q. No talk with him at all? A. No.

Q. How did you come to know him? A. Why, I have known him as an attorney.

Q. Under what circumstances did you get acquainted with him? A. I am not acquainted with him, just knew of him.

Q. You just knew him by sight? A. Yes, sir.

Q. Have you talked with Loar and Hayes about the matter? A. About our case up here in Leavenworth?

Q. Yes. A. Yes.

Q. Talked to them since you have been convicted? A. Yes.

Q. And as to when you had this arrangement with McCarthy? A. When we had what arrangement?

Q. To rob this Missouri Pacific train? A. Not especially that, no, because we all know about it, everybody in the bunch knows about it.

Q. You boys haven't talked very much about it, have you? A. We talked about our time, yes.

Q. Let me get it again, I understand you were all over at the trial of Hogie Ward, these parties

you have mentioned here over there at that trial of Ward, were you not? A. Yes, sir.

Q. It was what you called the gang, is that right? A. Yes, sir.

Q. And how many were in that bunch? A. Eight or ten or more.

Q. And you say it was then that you and McCarthy got to talking? A. Yes, up on Minnesota Avenue at that trial.

Q. And you didn't arrange to rob any particular train at that time, did you? A. We arranged to rob some trains up at Leavenworth, yes.

Q. When? A. That night.

Q. You arranged to rob some train at Leavenworth that night, you had that plan with him then? A. When?

Q. You had that plan made that day, did you? A. Yes.

Q. Why didn't you so testify previously? A. I don't remember whether it was asked me or not.

Q. Isn't this the first time you have ever testified anywhere, or told any person in the court room that you had this plan made during the day before nine-thirty o'clock that night to rob these Missouri Pacific cars, isn't this the first time you have testified on this subject when you have said this occurred prior to nine-thirty? A. I don't remember.

Q. Can you remember any time or place when you told any person before this testimony today that you and McCarthy had this plan prior to nine-thirty that night? A. I don't remember.

Q. You don't remember of it. Can you tell me whether you ever told anybody in court or out of court that this thing occurred prior to nine-thirty that night? A. I don't remembre.

Q. Did anybody ever ask you the question, excepting Mr. Thompson, as I read a little while ago as to when this agreement was made to rob box cars?

Q. I mean, besides Mr. Talbert here. A. I don't remember.

Q. You don't remember any other occasion besides when Mr. Talbert asked you the question as a witness, what time this arrangement to rob box cars was made between you and McCarthy? A. I don't remember anybody ever asking me about it.

Q. Did anybody ever make any suggestion to you as to when this agreement was made? A. I don't remember.

Q. You don't remember—that is the best answer you can give for it?

Q. What do you say? A. I don't remember.

Q. How many times have you been arrested?

Q. I will get at that. How many times have you been arrested? A. I don't know, four or five.

Q. Not more than that? A. Not as I remember right now, it is not any more than that.

Q. Were you arrested for the Wolcott robbery? A. No.

Q. You say that was shortly before the killing of David? A. Yes.

Q. About how long, along inside of a month, how long would you say now that you have known McCarthy? A. I have known him about ten years.

Q. Where did you get acquainted with him first? A. In Armourdale.

Q. And you have been in how many robberies with him? A. Several.

Q. Well, how many do you say, you were asked about it, how many were they all told? A. You want me to name them?

Q. About how many were there altogether —I believe you only named box car robberies before. A. Why, there was several of them.

Q. Were they any pay-roll robberies? A. One.

Q. What was that? A. American Express.

Q. Who else was in that? A. McCarthy was in it.

Q. Well, who else? A. The rest of them are still out.

Q. Who are they? A. No convictions on them.

Q. Who are they? A. I can't afford to tell.

Q. You can't afford to tell? A. Some of them are still out.

Q. Well that isn't any particlar reason, is it for not giving the names? Where was that robbery you speak of? A. In the West Bottoms, Kansas City, Missouri.

Q. About what time? A. Why, it wasn't such a long time before this killing up here.

Q. Well, about how long? A. Couldn't have been over a month before.

Q. I will ask you again to give us the others' names besides yourself and McCarthy.

Q. (Mr. Hackney) Are you trying to protect some of your pals? A. Yes.

Q. You and Loar and Hayes got very angry at McCarthy for turning you in on this matter, didn't you? A. No, not especially.

Q. You don't feel very kindly toward McCarthy, do you? A. No, I am not in love with him, but I have no personal grudge against him.

Q. He testified against you, didn't he? A. Yes.

Q. And that angered you, didn't it? A. No, couldn't call it anger, I didn't like it, couldn't call it anger though.

Q. And so you are wanting to say anything ugly you can against McCarthy today, aren't you? A. No, not especially, just tell what I know.

Q. And is your memory any better now than it was two years ago? A. No.

Q. The memory as to when you first had your arrangement with McCarthy on the date of David's killing was better then than it is now, wasn't it.

Q. (Mr. Hackney) What do you say? A. Just the same.

Q. Just the same then as it is now. Did you have any reason on the trial before to state the matter any differently from what you have done today? A. No.

Q. You remember testifying on the trial of Hayes and also on yours, that McCarthy had

a bottle of cocaine and took some of it that night? A. Yes, sir.

Q. You did testify to that, did you? A. I recollect something about testifying something about that.

Q. And you said after he took the cocaine he jumped around like a crazy man. A. I disremember what it was.

Q. You don't remember what you said about that? A. No, I disremember.

Q. That he claimed he was a railroad bull and "I will show you if you will go with me over to Leavenworth?" A. I don't remember.

Q. You don't remember him saying that? A. No.

Mr. Hackney: I will ask that the testimony I have shown the witness be identified by the reporter and attached as part of his deposition.

(Said document so offered in evidence by the defendant was at the time duly marked "Defendant's Exhibit 1" and is attached hereto and made a part of these depositions and is as follows):

BERT GLADSON, the defendant herein, having been first duly sworn, testified as follows:

Direct Examination by Mr. Thompson.

Q. State your name to the court? A. Albert C. Gladson.

Q. Where do you live? A. 831 South Third Street, Kansas City, Kansas.

Q. How old are you? A. Twenty-two years old.

Q. Twenty-two? A. Yes.

Q. Along in 1920 or 1921 you were arrested and sentenced to the penitentiary in the State of Missouri? A. Yes, sir.

Q. How long did you serve down there? A. Eleven and a half months.

Q. What had been your business prior to that time? A. I was time keeper for Swift and Company for fifteen months, just before that I was time keeper for and checker for Cudahy and Company for 18 months, and clerk and mail clerk for Avery and Company in the west bottoms for three years.

Q. When were you released from the penitentiary at Jefferson City? A. August 6th, 1921.

Q. You were also arrested in Paola or tried in Paola? A. Yes, sir.

Q. For assault with intent to kill down there? A. Yes, sir.

Q. At that time as I understand were shot with two loads of buckshot and two bullets went through you? A. I was.

Q. Three juries were empanneled for you down there, one mistrial and one hung jury, and you were finally convicted and the case is now in the Supreme Court? A. Yes, sir.

Q. Your testimony down there at that trial was that you did not have a revolver? A. It was.

Q. Mr. Gladson, how long have you known this man, McCarthy? A. Known him for about two months.

Q. About two months? A. Yes, sir.

Q. Under what circumstances did you get acquainted with him? A. Why, he came over and wanted me to rob box cars with him.

Q. How many different box car robberies do you know of his having perpetrated? A. Well, I know he tore up the Rock Island railroad from 18th Street plumb to Mill Street, sixty or 80 cars and carried away six cases of shoes from the Kansas City Terminal; carried away four cases of shoes from the Santa Fe; and shot the Union Pacific detective on Mill Street in Kansas City, Kansas.

Q. Who shot the detective there? A. Harry McCarthy.

Q. Do you know where he disposed of some of that stuff? A. I do.

Q. Do you know where he tried to sell the 12 cases of shoes? A. I do.

Q. Where did he try to sell those 12 cases of shoes? A. At Packard and Osage, Myron Kauffman's, something like that. Right on the corner, the clothing store, the fellow upon the witness stand.

Q. Upon the 16th day of June, what time did you first see McCarthy that day? A. 16th of June?

Q. Well, the 16th day of May, I beg your pardon. A. Seen him around noon up at the district court, Kansas City, Kansas.

Q. Did you leave there with him? A. I did not.

Q. When did you first see him that night? A. I seen him down at Riley's house 1016 South Coy Street.

Q. What time did you go down to Riley's house? A. About six fifteen.

Q. Was he there at the time you got there, do you remember? A. Yes, I believe he was.

Q. What time did you leave there? A. It must have been close to seven o'clock.

Q. Who did you leave with? A. With Lawrence Hayes, and Harry McCarthy, Charley Masterson and myself.

Q. Where did you go? A. I asked Lawrence Hayes to take me to 10th and Central. When we got up there I said, "Let me out at 10th and Central." I had a date with a girl up there. He drove up there and let me out.

Q. Was there any arrangement at that time made to meet them again? A. No, there was not.

Q. When did you next see any of the party? A. It was close around 9:30. I seen—I was waiting for a 10th and Central street car going to Armourdale and I seen Lawrence Hayes and Harry McCarthy coming along in his car. Harry McCarthy said, "There is Bert; you might as well get in." I got in and went down to Armourdale with them.

Q. Up to that time had there been anything said about a box car robbery? A. There was not.

Q. Was there anything said at that time? A. Well, yes, McCarthy says he and somebody else went down to Third and Minnesota, and they seen a freight going out. They got it in their head to go and make it.

Q. Got it in their head to what? A. To go up and make that freight train.

Q. All right, what did they say to you, did they ask you—want you to go along? A. McCarthy asked me if I wanted to go along.

Q. What did you tell him? A. I told him, "anything was good enough for him was good enough for me."

Q. All right, then what did you do? A. McCarthy said, we better get Red Loar to go.

Q. Who said that? A. McCarthy said that, so they went on down. McCarthy went upon the front porch and went in the house.

Q. Now, about what time of night was that? A. Oh, that must have been fifteen minutes to ten.

Q. Now, do you know whether or not Loar was in bed? A. Well, somebody hollered out to me and Hays, in the car; somebody hollered out, he was in bed, that he would be out in just a minute.

Q. Where did he go? A. To my house down on South 3rd.

Q. What did you go to your house for? A. To get some guns.

Q. Some what? A. Guns.

Q. Did you get any guns there? A. I did.

Q. What two guns did you get? A. I got one 44 Smith and Wesson, one 45 Colts automatic and a jacket.

Q. Now, what did you do with the guns? A. Put them inside of the pocket in the car.

Q. From there where did you go? A. We went up to Leavenworth; started to Leavenworth.

Q. What did you say? A. We went to Leavenworth; it is this way. I never been out here before; they said they were going to Leavenworth.

Q. Now at that time—as you came along do you know whether or not anybody threw a flashlight in your car? A. Not to my knowledge.

Q. Do you know where you turn on to the rock road? A. I do.

Q. Did your car come anywhere near upsetting there? A. I did not.

Q. Did you pass any car at that point? A. We did not.

Q. From there where did you go? A. Straight out that road as far as I know; that pavement road, kept on following it.

Q. Where did you go to? A. We ended up here at Leavenworth.

Q. Now, Mr. Gladson, I will ask you when you were to leave the yards down there how did you come out of there? A. What yards?

Q. Well, you sat in the car down here somewhere, you do not know where it was? A. Down here somewhere.

Q. How long did you stay in your car? A. Well, we set there fifteen or twenty minutes then.

Q. Now was there—

Mr. Bond: Let him finish, then what?

A. We set there fifteen or twenty minutes.

Q. What transpired down there? A. Why, there was nothing right then. About two or three minutes we seen a car coming.

Q. What do you mean, an automobile? A. An automobile come down the same street, so we started the car up and went around a ways and come back to the same place in ten minutes later.

Q. How long did you stay there? A. That time we just stayed there, oh, it must have been three-quarters of an hour or an hour in that one place.

Q. Did you go down into the yards? A. What yards?

Q. Did you go down where the railroad tracks are? A. I did after while, yes.

Q. Did Nathan Loar and Hayes go down there? A. No, sir.

Q. You know why they did not go down there? A. Yes, sir.

Q. Tell the jury why they did not go down there? A. Well, just, we heard the train whistle, somebody said, "That must be the Mop coming up." That is the way they call the Missouri Pacific, said, "The Mop." About that time well McCarthy he pulled out a little old bottle about that big with white stuff in it and said, "You fellows want a shot?" Somebody in the crowd asked him what it was. He said, "Cocaine." Everybody declined. He said, "I am going to take a couple of sniffs myself." Anyway he took a couple of sniffs and he put the bottle back and I do not know what kind of stuff it was. Red, Hayes and myself—a little while after Harry McCarthy said, "I am a railroad bull." He said, "Come on, I will make you fellows rich." He said, "Come on." The three of us finally said, "We ain't going with you, you are a dope user."

Q. Why did you object to going with a dope user? A. Well, they are liable to shoot somebody and blame it on to you or anybody else. You cannot tell what cocaine fellows will do; these men don't know what they are doing, neither do we.

Q. So Loar, and Hayes refused to go with him at all? A. They did. I did at first myself.

Q. How did you happen to go down there with him? A. McCarthy kept jumping around. He says, "I will go down there myself; I will show you fellows something." Red and Lawrence said, "Go jump into the river." I did not know,

so presently I said, "I will go with you and see if you mean it." "See if you mean it." He said, "I will go down there and see a railroad detective down there and show you I am a bull—I am a railroad detective; they cannot do nothing to nobody anyway." I said, "All right, go ahead, I want to see whether you are a railroad detective or not, I don't believe you."

Q. Just tell what happened, all that he and you said. By the way, at the time you left you said you put two revolvers in the pockets of your car? A. Yes.

Q. Were they taken out? A. They were.

Q. When were they taken out? A. Before ever we left the car after McCarthy took this white stuff, I do not know what it was. He says, got all spoofy, jumped down in the car. There was a flashlight and crowbar in the bottom of the car. He got that out and put it in his pocket. The flashlight resembled this one here. I do not know whether it is or not. He said, "Give me that big long pistol." He said, "I cannot shoot this other pistol." He took this Smith and Wesson pistol out. He said, "I cannot use this other because I got one finger off." He said, "I cannot work it right."

Q. What was the 45? A. The 45 was the Colt's automatic.

Q. Was that more difficult to work than the ordinary revolver? A. It was two or three obstructions with safeties and things you have to work before you can shoot.

Q. So which one of the revolvers did he have? A. He had the 44 Smith and Wesson.

Q. Just tell the jury from that time on what happened when you got down there. A. Well, after he got this stuff up there he got this crowbar we got out of the car. He said, "Come on you fellows." Nobody would go but myself, so I went with him after that. I went right over and we caught this freight train just pulling out. It stopped before. We got the freight train and rode down, I do not know three quarters of a mile or half a mile and then it stops, so he says, "Come on" and jumped off the train and started walking back, walked back for, he must have walked back three or four cars. We seen somebody—

Q. Just a minute, Bert. As I understand you went down there with him, he was going to take you to one of these railroad policemen and show you who he was? A. He was going to identify himself as a railroad bull. I did not believe him.

Q. Was that why you went down there with him at that time? A. It was.

Q. All right, go ahead. A. When the train stopped why me and him, we got off. He said, "Come on." While walking back so we could find one of these fellows on that train he was going to meet. We were walking back there at that time, we were still on the other side of the car. He said, "That ain't nobody but a bum." He said, "Let's go on down." He said, "I don't see anybody, let's get on the other side." We got on the other side, but before we got there he got on top of a bumper and I went underneath. I got on the other side and I looked up and down.

I did not see anybody. He was still up there. I said, "I don't see anyone coming on this side; we might as well go back." About that time somebody put a flashlight on us.

Q. What happened? A. Well, when he put this flashlight on us I could not see McCarthy then because McCarthy was between the cars and I was standing on the ground. He said, "Come over here." He said, "Come over here on this side," so I said, "Well, I did not know, I did not believe I wanted to go over on the other side," so I started to running. About that time I heard two shots. Somebody hollered, "Oh! oh!" I ran down beside of the cars and pretty soon right after me why comes McCarthy. He said, "Get over between the cars, get underneath," so we got over. I run up the side of the cliff and I got almost to the side of the cliff and somebody put a flashlight on me and I kept running, and he started shooting, and I heard him shoot in back of me and I run up the cliff.

Q. Now, Gladson, you had on a jacket? A. I did.

Q. Did you throw it away that night? A. I did.

Q. What for? A. It was cumbersome and I did not want it along.

Q. You were in a hurry to get away? A. I was.

Q. Did you find Hayes' car? A. Well, first before we ever found the car—

Q. Let me ask you a question. Did you ever drive an automobile in your life Bart? A. Well,

I drove once, yes, once; but I did not know how to drive.

Q. Can you drive an automobile? A. I cannot, no, without running into telephone poles.

Q. What is that? A. A fellow let me drive his car and I run it into a telephone pole.

Q. That is the only time you ever tried to drive one? A. That is the only time.

Q. Did you and McCarthy try to do anything that night with any cars? A. Yes.

Q. What? A. I walked, we came thru a yard first and walked up the street must have been a block and a half from the bluff and McCarthy says, "Let's try to steal this car," and I says, "I do not know whether we can do it or not; I cannot drive no car." He got in and worked around a little bit on it. He says, "It ain't going." So he got out again. It rolled down the street a little ways. We went down and tried another car, a Ford of some kind. It would not start so we walked on up the street over to back, over where we thought Hayes' car was.

Q. Now, did he make any statement to you about whether or not he had shot the man? A. After he got in the back end of the car and we started to Kansas City.

Q. Where were you sitting front or back seat? A. I was in the back seat.

Q. Where was McCarthy? A. McCarthy was right beside of me.

Q. In the back seat? A. Yes.

Q. Now, just tell the jury what conversation if any, you had with him at that time. A. Well, he says, "If I bumped this bull off down—"

Q. What is that? A. —"That makes three I have killed."

Q. Did he tell you who the three were? A. He said a New Orleans policeman; McDonald from Kansas City.

Q. Did he tell you the name of the New Orleans policeman he had killed? A. No, he did not say.

Q. Up to that time did you have any intimation of the fact he had killed McDonald? A. I did not.

Q. Did he tell you why he had killed McDonald? A. No, he just mentioned it; he said, "That makes three on my list now, if I bumped off this one."

Q. Now, when you got in the car where did you come? A. Came to Kansas City.

Q. And where did you go to? A. I went home.

Q. Were you the first one to get out of the car? A. No, McCarthy was the first one out of the car.

Q. Where did McCarthy get out? A. The end of the Argentine street car line.

Q. Did he get out and take the street car? A. I do not know what he got out to take; I guess he did. He said, "Let me out here."

Q. Now, Bert, how long was it after this expedition at Leavenworth, that you knew that you were wanted in connection with the killing here? A. How long after the expedition to Leavenworth?

Q. How long after the killing of McDonald (David) on the 17th; how long after that was it you knew that the authorities were looking for you? A. On the 19th, Saturday.

Q. Saturday. Just tell the jury how you found it out? A. Well, Freddie Thompson told me first. He says, "They are looking for you for something." I says, "Well, if they are doing that I am going up to see Mr. Thompson and turn in on my bond." So I called up Mr. Thompson's office—Charley Thompson.

Q. When you got to my office you and Mr. Loar got there, you were each out on $5,000 bond? A. Yes, sir.

Q. What did I tell you at that time I wished to do with you? A. To turn me in on this appeal bond.

Q. How long did you stay in my office, about two or three hours? A. Well, we had to wait for Mr. Loar, he did not come up at the same time.

Q. Then you were surrendered to Robert Darnell and Ruddie Marker, two officers upon your bond? A. Yes, sir.

Q. Now, is there anything else in connection with this matter you want to tell the jury about? A. I do not know, unless it would be I did not say, when I got to the top of this cliff there I kind of slowed down and McCarthy emptied his gun up there and reloaded.

Q. You mean when you got on top of the cliff he took the shells out of the gun? A. He did and reloaded.

Q. That is all. You may take the witness.

Cross Examination by Mr. Bond.

Q. In other words McCarthy's testimony was all the truth except when it came to the shooting; he did the shooting instead of you, and he reloaded

his gun on top of the hill instead of you? A. No, sir.

Q. The principal points are about the same you have testified to? A. No, the principal points are not the same.

Q. Aren't they, well, let's see young man. You say you are how old? A. Twenty-two years old.

Q. Twenty-three? A. Twenty-two.

Mr. Thompson: Twenty-two.

Q. Twenty-two. How many times have you been arrested? A. Oh, about three times.

Q. How? A. About three times.

Q. Three? A. Three or four.

Q. Three or four? A. Not many more.

Q. Any more than four? A. No, sir, not as I can recollect.

Q. Well, let's see, can you remember how many times you have been arrested? A. Yes, I can remember.

Q. Well, now, let's see what were those four times you were arrested?

Mr. Thompson: Just a minute. I object to the question as immaterial.

The Court: I think it is proper.

Mr. Kelsey: Conviction is what counts.

Mr. Bond: I thought that until I went to the Supreme Court in a case too.

Q. You have been arrested four times, you say? A. Three or four.

Q. When was the first time? A. I do not remember.

Q. You do not remember the first time you were ever arrested in your life. Now, just wait

a minute. Young man, you realize that you have been sworn here to tell the truth? A. I am.

Q. The whole truth? A. I am.

Q. You want to tell the truth and you cannot remember the first time you were arrested in your life? A. I could not remember the exact date the first time I was arrested.

Q. Where was it? A. Kansas City.

Q. What for? A. Oh, I think for throwing snowballs.

Q. For throwing snowballs; how old were you; that is one time? A. Fifteen or sixteen years old.

Q. All right; what was the second time? A. I believe it was in 1919.

Q. For what? A. For grand larceny.

Q. For grand larceny; where was that? A. Kansas City, Missouri.

Q. Kansas City, Missouri, grand larceny of what? A. Grand larceny.

Q. I know, what was it you were stealing? A. I was not stealing.

Mr. Thompson: I object to the question as immaterial.

Q. It is preliminary. Weren't you arrested and convicted and sentenced to the penitentiary for larceny from a freight depot having stolen seven cases of shoes from the Chicago, Milwaukee and St. Paul, or is that a mistake? A. That is the one I just told you I done eleven and a half months for.

Q. That is the one? A. That is the one.

Q. That is the Lansing term? A. Yes, sir, Lansing.

Q. That is the second time; now the third time when was that? A. Oh, about, whenever it was; it was in April, 1922, I believe.

Q. 1922 in April, what was it for? A. Down at Paola, Kansas.

Q. Paola, Kansas. That was the time that you were arrested down there for robbing the Missouri Pacific? A. No.

Q. Freight? A. No.

Mr. Thompson: Just a minute. It is proper for counsel to ask him how many times he has been arrested, but it is not proper for counsel to cross examine him as to why he was arrested and the circumstances surrounding the arrest. When he says he was arrested that concludes counsel's questions on that point.

Mr. Bond: I have an absolute right to show what he was convicted for. I will ask you if you were arrested for robbing a freight train of the Missouri Pacific, and at the time you were arrested if you or your companion Loar, this Red Loar here, did not shoot this man in the breast and it came out the back, and through the legs at that time? A. I did not; I did not rob no box car.

Q. What were you doing? A. I was doing nothing.

Q. What?

Mr. Thompson: Just tell where you were.

A. I was down to the City of Osawatomie and this fellow standing up and another fellow tried

to steal a truck of ours, and Red Loar shot this fellow.

Q. And that is what you have gotten ten years in the Kansas Penitentiary? A. I am not in there yet, I am out on appeal.

Q. This appeal is set for tomorrow morning, you have never filed an abstract or brief of your case? A. We have time yet.

Q. That is the case on which you are out on $5,000 bond signed by Mr. Thompson, you and Red Loar? A. He did not sign.

Q. You gave your testimony in that? A. Yes.

Q. That is your third time; when was the next time you were arrested, the fourth time? A. I was picked up on the American Express hold-up in Kansas City, Kansas.

Q. That is the American man who sat there and said you were the one who robbed it; is that the time? A. One he thought.

Q. Did he say he thought you were the man, or did he say you were the man? A. I understood him to say, "He thought."

Q. You understood. That is a good understanding. Don't you know Mr. Thompson asked the witness, the first man in here, who helped in that robbery? A. Yes.

Mr. Thompson: I object to that as not cross examination. I did not ask this witness anything about that.

Q. You were arrested on this American Express Robbery that Mr. Wisenberg testified to; that was the fourth time. Is that all? A. Only this last one.

Q. This is number five then. Is there any charge in Missouri against you now? A. Not as I know of.

Q. You have fought requisition issued from Missouri? A. I have not.

Q. You do not know of any requisition out from Missouri for you? A. No, sir.

Q. Were you arrested in Ottumwa, Iowa, at some cabin well armed up there and turned over to the Kansas authorities? A. That is the same one you just told about.

Q. That is that one? A. I was not well armed or nothing of the kind.

Q. You were not well armed? A. No, sir.

Q. You say this night there at Kansas City they came to you—I don't remember these names—and they suggested you go up here and rob a freight train? A. McCarthy did.

Q. McCarthy. You said, "Whatever is good enough for you is good enough for me?" A. I did.

Q. You came on? A. I did.

Q. Yes, and in some way, he suggested that you come, McCarthy suggested it, did he? A. Yes.

Q. Did McCarthy suggest Red Loar go along and help? A. I do not know that.

Q. So he did not do that; it was you suggested to get Red Loar? A. I know he said something about McCarthy.

Q. Oh, yes, he did say something about McCarthy. A. No, I did not. He did.

Q. Oh, yes. Who then got in this automobile and drove up here? A. Hayes.

Q. You had never been up to Leavenworth? A. I had not.

Q. Had Hayes? A. I do not know.

Q. Who was it knew how to get up here?

Mr. Thompson: I object to the question as immaterial.

Q. You did not just drop down here did you from the clouds? A. It was not me.

Q. You had never been up here? A. I had not.

Q. You sat in the automobile and they finally drove you and landed you some place near the railroad, is that it? A. They did.

Q. But before you left Kansas City, did McCarthy make you stop and get this 44 and 45? A. He asked me to.

Q. Who was it, you or McCarthy? A. One was for him.

Q. Who was the other for? A. Somebody else.

Q. Who took the other? A. I did at last.

Q. You did at last. He forced you to take it tho, did he not? A. He did not.

Q. But you really finally did take it? A. I did.

Q. You took a jacket from your house; that is the jacket? A. One like it.

Q. One like it; then you come on to Leavenworth and you stopped down here at the railroad tracks: then you saw an automobile and you drove around for a while and came back again; is that it? A. The car was driven around; I was in it.

Q. You did not drive the car; whoever was driving the car, you were with him in it? A. Yes.

Q. Then you came back there and waited for the Missouri Pacific to come in? A. Yes.

Q. Whose guns were these that you got at your house? A. Why, one of them was mine and another fellow owned the other.

Q. What other fellow? A. I do not remember his name.

Q. Cannot remember his name. How long had you owned yours? A. Oh, I must have owned mine a couple of weeks.

Q. Bought it from this man on the witness stand, did you? A. I do not know; whether he was on the witness stand or not.

Q. Have you been sitting right before this jury all the time? A. Yes, I was writing for quite a while.

Q. You paid so little attention to the trial you do not know who the witnesses were on the witness stand where the charge is murder and you may go to the penitentiary for life.

Mr. Thompson: I object to the question as argumentative and improper, and immaterial.

A. It may be exactly like the revolver I had but it looks like one McCarthy had.

Q. We may get to that next. We just get to one at a time. At any rate you do not know whether the man on the witness stand got a gun from you? A. I was not listening to him. I did not hear him say I bought a gun.

Q. You do not know a man was on the witness stand and swore you bought a gun of him? A. I am not sure.

Q. You are not sure about that. Where did you buy that gun? A. Kansas and Packard.

Q. What kind of a gun did you buy? A. Bought a 44 Smith and Wesson.

Q. Did you buy any ammunition at that time? A. Yes, I bought a box of shells.

Q. A box of cartridges. Now, when you got up here and waited for the train to come in, you say in a little while McCarthy took out a bottle with some white stuff in it? A. He took out some cocaine is what he said it was.

Q. In a bottle? A. A little bottle.

Q. A little bottle? A. A little round bottle.

Q. You did not know what that was? Did you? A. That is what he said.

Q. I know you personally do you know what cocaine is? A. I did not take any of it.

Q. I said you, did you personally know what cocaine was? A. I personally know if I saw it?

Q. You saw it? A. I seen what it was; I seen it was white powder; I did not take any. You cannot tell cocaine unless you taste it.

Q. Do you know what it tastes like? A. I have seen it.

Q. Have you tasted it? A. I have.

Q. Then you know what it tastes like.

Mr. Thompson: Now that is settled.

Mr. Bond: Yes, for once.

The Witness: Ask him, he knows.

Q. That is all right, we will get at him after while. You did not take any of this cocaine? A. I did not.

Q. If this man did then commence to get gay he got a taste; he told you as I understand "I am

a railroad detective?" A. No, he said, "I am a railroad bull."

Q. "I am a railroad bull." What does bull mean? A. Well—

Q. In your parlance, does it—what does bull mean; does it mean an officer? A. Means a policeman.

Q. Policeman, "And just to show you I am a railroad bull, I will take you over here and introduce you to show you?" A. Why, sure.

Q. You wanted to meet them? A. No, I wanted to see whether he was or not.

Q. The only way to decide if he was or not was to have you go over and introduce you? A. No, not introduce me, I was going to stand outside and see what he was going to do.

Q. You were going to stand outside and see what he was going to do, so you reached in the pocket there and took out the 45 gun, and he reached in the bottom of the car and took out the crowbar to go over to see whether he knew the bull, is that it? A. No, I did not.

Q. Who was it took it? A. Your friend McCarthy did.

Q. Then you went over to meet the bull? A. We didn't go over to meet—I went over—

Q. You went to meet the bull. Where was the 45—strapped on the crowbar? A. No, I did not see the 45.

Q. The 44. He reached in the car and took out the iron crowbar? A. He did.

Q. You thought he was going over to show you he knew the railroad officers? A. He was cocky enough to go over to see most anything.

Q. You say you wanted to go over to see. When you were told in the car you had no idea he was going to rob a box car? A. I did not.

Q. Sure not. When you saw this iron bar you thought he was going to pick his teeth with it? A. Could have tried to pick some of the rest of the bulls' teeth.

Q. You had no idea you were going to rob a freight car? A. No, I was not going to rob nothing.

Q. You did not anyway, when you got over there. Now, you say Loar did not go with you? A. No, to my knowledge he did not. I was there.

Q. That he stayed in the car? A. Yes.

Q. And then when you got over here you met this railroad man and McCarthy shot him? A. Yes.

Q. You were not even there when he shot him? A. I was running.

Q. You were not there at the place where the man was shot at all; you were running up the train? A. No, I was running; that ray just come around from the other side.

Q. I thought you said you started running when you heard the shot being fired? A. I did.

Q. And is that the way you were going to find out whether McCarthy knew the railroad bulls or not by running as soon as you saw one? A. After I heard that I was not particular—

Q. After you heard what? A. Them two shots.

Q. Just wait a minute. The shots were not fired when you saw the man?

Mr. Thompson: He just told you he was standing off to one side; do you want him to go up and hug the bull.

Q. He just told me, did you not tell me he gets close to him—naturally you were going over to meet the railroad bull? A. No, I was not.

Q. You were going over to see McCarthy meet the railroad bull, and the minute the man flashed the light on you, you ran? A. Not the minute he flashed it on me.

Q. Didn't you just testify "the minute the man flashed his light on me, I ran, and while I was running I heard two shots fired." Didn't you swear that to the jury here? A. Just about the time I heard—I heard two shots fired.

Q. That is the way you went over to see whether he knew them or not? A. I was pretty well satisfied then.

Q. Were you satisfied before you ran? A. I say I was pretty well satisfied.

Q. Were you satisfied before you ran? A. I was pretty well satisfied.

Q. What satisfied you? A. That light satisfied me for one thing.

Q. Because the man threw his light on you. How was this man going to find out who you were? A. I did not want him to know who I was.

Q. And then when the shooting was over you ran up the hill; you did not shoot at anybody, did you? A. I did not.

Q. When you ran up the hill, you did not turn around and shoot at a man that had a flashlight in your face? A. No, I did not.

Q. You did not do it? A. No.

Q. But you ran up the hill; did you have a flashlight at all? A. I did not.

Q. Did he have one, McCarthy? A. He had one in the bottom of the car; I think he picked it up.

Q. He picked it up. When did you find out that the coat was in your way, cumbersome? A Up here in Leavenworth somewheres.

Q. The thing did not obstruct your running until you got up from the railroad track? A. I was pretty well mixed up in the shooting down there, and I did not stop to take it off.

Q. Weren't you mixed up in the overcoat and McCarthy had this on? A. I did not say I had an overcoat on.

Q. You say you had this on? A. I do.

Q. How far did you throw the coat away from the train you were stealing from? A. I did not say I was stealing.

Q. McCarthy trying to steal? A. Well, I do not know just how far it was.

Q. About how far? How many blocks had you ran? A. When I got up on top I did not run at all.

Q. How many blocks had you walked? A. I do not remember, maybe a couple of blocks.

Q. Maybe a couple of blocks. Don't you know it was not a block from where you threw it away to where this man's car was you got into? A. I do not know; I did not get in no car.

Q. You did not have anything to do with it? A. I said I did not try to steal it.

Q. Didn't you say you got on it? A. No, sir, I did not say I got on it.

Q. Did not touch it? A. No, I did not touch it.

Q. You stood to one side and let this man try to get the car? A. He got in it.

Q. What did you do? A. I stood out there and watched him.

Q. You just stood there and watched him manipulate it? A. I stepped up.

Q. You stepped up when it rolled. Who rolled it down hill? A. He must have rolled it, I did not.

Q. Did you get in while the car was— A. No, I stood on the side of the car.

Q. You stood on the side of the car? A. After it was rolling.

Q. You let it roll then you stepped on the runningboard of the car, is that it? A. Along the runningboard; I do not know much about a car.

Q. You know the runningboard from the engine? A. I expect I do.

Q. Do you know the runningboard from the engine? A. I could not tell you very well.

Q. You do not know? A. (No response.)

Q. When he could not get the car to go did he try to get another automobile right close there? A. No, not right close there.

Q. Well, within a short distance from where this car stopped? A. He did not try to get it; he just seen whether it was locked or not.

Q. Then, did you come on down Fourth Street, that is the street with the street car tracks? A. I am not acquainted wih Leavenworh. That is the first time I was here.

Q. At any rate where did you find the automobile? A. What automobile?

Q. The automobile you came back to Kansas City in? A. Some street down here.

Q. How did you happen to run across them? A. How did we come?

Q. How did you happen to come to where you got up with them? A. Why I was so mixed up, McCarthy says, "Here Hays is" and they drove down here. He says "Let's turn around, we are going the wrong way," so we started in that direction. We got so far down there and met him.

Q. You just started up Fourth Street and happened to meet him? A. It must have been around—I do not know where we met him.

Q. You have no idea where you were when you met him? A. No, I have no idea.

Q. Then you went on down to Kansas City? A. Yes.

Q. As soon as you found out you were wanted you went to Mr. Thompson's office and gave yourself up on the bond which you are out on on account of a conviction down at Paola? A. Yes, I did that.

Q. Then they arrested you in Mr. Thompson's office, did they not and brought you up here? A. I was turned over on the bond in Mr. Thompson's office.

Q. What? A. I was turned over on the bond in Mr. Thompson's office.

Q. And the authorities of Leavenworth got you and brought you here? A. I was in jail when they got me.

Q. You were taken then to jail and they went down and got you and brought you up here? A.

When they turn you over on a bond you go back to jail. I was in jail when they brought me up here.

Q. You went to Thompson's office and gave yourself up on a bond, then you were taken to jail by the officers to whom you gave yourself up in Mr. Thompson's office? A. By Mr. Thompson and the officers.

Q. What? A. By Mr. Thompson and the officers. We all went down together and got in jail and then I come up here.

Mr. Thompson: I didn't.

Mr. Bond: Well, you missed it this time.

Q. And when you were arrested then McCarthy told you that he had killed McDonald, did he? After McCarthy testified down here at the preliminary hearing and after you were held for murder in the first degree then you told Mr. Thompson that McCarthy had told you that he had murdered a policeman, is that right? A. He mentioned it.

Q. He mentioned it? A. He was in the car and he said he killed three men, "If he killed this one, that makes three on his list."

Q. Do you remember of throwing this coat away, where you threw it away, whether you threw it out in the street, along the sidewalk or where? A. I threw it in kind of a back yard.

Q. Towards the alley? A. I do not know whether there was an alley there or not; it was at the back end of a house.

Q. You did not see McCarthy throw away a searchlight? A. No, I didn't see him.

Q. As I understand you, he had it? A. I seen him pick it up in the bottom of the car.

Q. Did he take one of those revolvers; you say you took the 44 Smith and Wesson? A. He did.

Q. And he took the crowbar? A. Yes.

Q. Had all three of them in his hands? A. No, sir.

Q. What did he do with them? A. Put the crowbar on his arm; put the revolver in his belt.

Q. Carried this light in his hand, or do you remember? A. I do not know how he carried the light; I did not notice the light going over.

Q. I think that is all.

Mr. Thompson: I believe that is all.

Mr. Bond (continuing): You said that other gun belonged to somebody else; was it Loar's gun?

A. No, it was a Mexican's over on the boulevard.

Q. What is his name? A. I do not know his name.

Q. You do not remember his name? A. The Mexicans have funny names.

Q. What number on the boulevard? A. I do not know; Southwest Boulevard there somewhere.

Q. How many miles long is the boulevard? A. I do not know.

Q. He is somewhere there; that is the man owns that gun? A. This Mexican.

Q. That is all.

(Witness excused.)

Plaintiff offers in evidence the deposition of Lawrence Hayes, taken in the State Penitentiary at Lansing, Kansas, March 24th, 1928, and the defendant offers in evidence the exhibits attached thereto as follows:

Said depositions and exhibits are in the words and figures as follows, to-wit:

LAWRENCE F. HAYES, of lawful age, being by me first duly cautioned and solemnly sworn to tell the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination by Mr. Seacat.

Q. You may state your name? A. Lawrence F. Hayes.

Q. You are now a prisoner in the State Penitentiary at Lansing, Kansas? A. Yes, sir.

Q. Where was your home, Mr. Hayes, before you came to the penitentiary at Lansing? A. Kansas City, Kansas.

Q. And what business were you engaged in in Kansas City, Kansas? A. None in particular.

Q. Where did you live in Kansas City, Kansas at that time? A. 725 South Boeke Street, Kansas City, Kansas.

Q. Were you acquainted at one time with Harry or Pat McCarthy? A. Yes, sir.

Q. Were you acquainted with Bert Gladsen? A. Yes, sir.

Q. And with Nathan, otherwise known as "Red" Loar? A. Yes, sir.

Q. And to fix the time, do you remember, an occasion, when a man named James Lee David was killed at Leavenworth, Kansas? A. Yes, sir.

Q. That occurred on the 17th day of May, 1923, didn't it, Hayes? A. Yes, sir.

Q. Do you recall where you were during the day prior to the night on which David was killed? A. Yes, sir.

Q. Where were you? A. In the court room of Judge McCamish—no, Judge Hutchings, in Kansas City, Kansas.

Q. What was the occasion of your being there? A. We were attending the trial of Hogie Ward.

Q. In Judge Hutchings' court? A. Yes.

Q. Well, you say, "We were attending the trial," who all do you mean? A. Well, there was Riley, George Riley, and myself; Masterson; Gladsen, and I believe Ray Brayner, and oh, there was a bunch there. I do not remember them all. I cannot recall.

Q. Do you remember whether Harry or Pat McCarthy was in attendance at Hogie Ward's trial at that time? A. Yes, sir, he was.

Q. Were you subpoenaed as a witness? A. No, sir.

Q. Just spectators? A. Yes, sir.

Q. During that day, that is the day prior to the night on which David was killed, did you have any conversation with Mr. McCarthy? A. Oh, several conversations. We talked practically all afternoon.

Q. And how early in the day did you first come in contact with McCarthy that day? A. Somewhere around eleven o'clock in the morning.

Q. You met him at the trial, did you? A. No, we met down at Riley's place.

Q. You met McCarthy at Riley's place? A. Yes.

Q. Then you went to the trial? A. We went to the restaurant first, I believe.

Q. During that time state whether or not, Hayes, you were present at a conversation, or had any conversation with McCarthy about the robbing—about committing a robbery during the coming night? A. Oh, yes, we discussed it.

Q. Will you state at this time what the substance of the conversation was? A. Well, he brought the subject up himself about stealing something, and I asked him where he thought he wanted to go. He said, "Well, anywhere." He said, "Leavenworth is close."

Q. What time of the day, or about what time as you recall any conversation, was it that you first discussed the subject of going out that night? A. Well, we discussed it practically at different times all afternoon.

Q. About when was it you first talked it? A. Oh, I guess two thirty, or two o'clock, somewhere along there.

Q. Somewhere along in the afternoon. Did you have at that time in this conversation with McCarthy any understanding as to what the nature of this robbery would be? A. Well, not exactly. It was generally understood we were robbing boxcars.

Q. Had you been doing that? A. Yes, we had been doing that a long time.

Q. This outfit, Gladsen, Riley, McCarthy, and Masterson had been associated together for some time; was that true? State whether it is a fact that you had on prior occasions shortly before this been robbing boxcars? A. Yes, we had been robbing boxcars quite regular.

Q. Did you have any conversation there at that time with McCarthy or during that day about any particular train you were to rob? A. Well, not exactly. It was a fact, well pretty near a fact, that at any time we went out we were robbing Missouri Pacific box cars.

Q. Why was that? A. Well, I do not know just exactly why, but I guess it was because they carried the most valuable stuff.

Q. What was the character of stuff you were trying to reach at that time? A. Why cigarettes, Camel cigarettes.

Q. Did McCarthy say anything to you directly about robbing the Missouri Pacific at Leavenworth that night? A. He mentioned going to Leavenworth; it was understood we were to rob the Missouri Pacific.

Q. Let me state it this way: What if any arrangements were made during the afternoon looking toward the fulfillment of this intention and plan to go to rob that night? A. There was no plan or anything made, just, we didn't have no set plans to rob cars that we figured on ahead just what we would do. We didn't use the same plan every time.

Q. You didn't use the same plan every time? A. We—

Mr. Hackney: Let him tell his story.

A. We used the same plan nearly every time, but we didn't plan it ahead. We just selected where we would carry it out, and would drive and carry it out there.

Q. After the trial adjourned in Judge Hutchings' court where did you go? A. Went to George Riley's place.

Q. What time did you leave the courthouse? A. Somewhere around five thirty or six o'clock.

Q. Did you go directly to Riley's house? A. Yes.

Q. And who went to Riley's house at that time? A. Well, McCarthy, myself, Bert Gladsen, Ray Brayner and Masterson.

Q. And that was about five thirty or six o'clock in the evening? A. Yes, sir.

Q. While you were at Riley's house, state whether or not you had any conversation concerning the purposes and activities of the night? A. Yes, McCarthy asked Riley to borrow a gun, but Riley would not let him have it.

Q. He asked Riley to borrow Riley's gun, is that the way you understood it? A. Yes, sir.

Q. You do not remember the conversation there at Riley's house? A. Not exactly, it has been so long ago.

Q. When did you leave Riley's house? A. About six thirty, or a quarter to seven.

Q. Where did you go from there? A. Went down to the restaurant to eat.

Q. Where? A. Sixth and Kansas Avenue.

Q. Over in Armourdale? A. Yes, sir.

Q. And who was along at the restaurant? A. Well, the same bunch with the exception of Ray Brayner.

Q. That McCarthy and Gladsen? A. McCarthy, Gladsen, myself and Masterson.

Q. Then where did you go when you left the restaurant? A. Why, Masterson wanted to go to the doctor's office.

Q. Where was the doctor's office? A. The doctor's office was at 7th and Armstrong.

Q. How were you traveling? A. Traveling in my car.

Q. You were driving? A. Yes.

Q. The doctor's office was about where the Elk's Building is located, is it? A. No, it is about a block north of the Masonic Temple.

Q. About a block south of Minnesota Avenue? A. Just a block.

Q. Just a block south of Minnesota Avenue? A. At the Federal Building.

Q. The Federal Reserve Insurance Building? A. Federal Insurance Building.

Q. And who was in the car when you went to the doctor's office? A. McCarthy, Masterson and myself.

Q. About what time was that? A. That was eight o'clock.

Q. About eight o'clock in the evening? A. Eight o'clock, or somewhere near.

Q. And where did you stop your car at the doctor's office? A. Stopped it right in front of the doctor's office, heading south.

Q. Heading south in front of the Federal Reserve Life Insurance Building? A. Yes, sir.

Q. Masterson got out of the car? A. And McCarthy too.

Q. Both Masterson and McCarthy? A. Yes.

Q. And do you know where McCarthy went when he got out of the car? A. He said he was going to the drugstore.

Q. He said to you he was going to the drugstore? A. Yes.

Q. Masterson went to the doctor's office? A. He went upstairs to the doctor's office in the Federal Reserve Building.

Q. You stayed in the car? A. Yes, sir.

Q. What happened next? A. Well, nothing happened until about five or six minutes. The way I figured what floor the doctor's office was on, on the third or fourth floor. I thought he went up the steps, and when Masterson came back down and got in the car he sit there and he lit a cigarette and said, "The doctor ain't there." I asked him what he was going to do, wait or stay there? He says, "Yes." So I says, "Let's go to the drugstore and get a drink," so we turned around and went to the drugstore on 7th and Minnesota, northeast corner of 7th and Minnesota. I stopped the car in front of the Bank, People's, is it?

Q. Directly across from the post-office? A. No, directly across from the drugstore, postoffice too.

Q. Southeast corner of the intersection? A. Yes, sir, People's National Bank. Stopped the car, locked it and went over in the drugstore and joined McCarthy there. We all had a drink.

Q. Was McCarthy in the drugstore when you got in there? A. Yes, sir.

Q. And so far as you know McCarthy hadn't gone up into the doctor's office with Masterson? A. No, I know that. I seen him go there.

Q. You saw him go in the door at the drugstore? A. I stopped in front of the door.

Q. How long in your judgment, Hayes, was it from the time that McCarthy left Masterson at the

door of the Federal Reserve Life Insurance Building until you saw him again at the drugstore? A. Well, I guess somewhere between six and seven minutes.

Q. Somewhere between five and ten minutes? A. Seven or eight, somewhere along there, seven or eight minutes.

Q. A substantial length of time? A. Substantial?

Q. Yes. A. Well—

Q. What was McCarthy doing when you got to the drugstore, or when you got into the drugstore? A. Why, I do not know. I guess he was looking around. Just,—I don't even know what he went there for. I guess he wanted a drink or something, but he was not drinking when he got there.

Q. Did he join you in your drink you had? A. Yes.

Q. That was, you say, about eight o'clock in the evening? A. Oh, that was a little later; that was about between eight and nine sometime.

Q. What had become of Bert Gladsen in the meantime? A. Oh, we left him off on the way up. He had a date that evening. We left him off at 10th and Minnesota—10th and Central.

Q. Tenth and Central? So he was not with you at that time? A. No, sir.

Q. Then, where did you go from the drugstore? A. We went down to the foot of Minnesota Avenue.

Q. About what street corner would you say that was? A. Foot of Minnesota Avenue? Then Masterson—

Q. Yes? A. That was about Second and Minnesota.

Q. Second and Minnesota? What were you going to say about Masterson? A. Well, Masterson went back to the doctor's office after we had a drink.

Q. He didn't go with you? A. No, sir.

Q. To the foot of Minnesota Avenue? A. I do not think so.

Q. What did you do at the foot of Minnesota Avenue? A. Well, there was a train pulling by there, you know, a loaded freight train.

Q. Yes. A. We pulled down, both got out of the car and walked down, and watched it go by.

Q. You were watching the train go by? A. Yes.

Q. Do you know what road that train was on? A. Yes.

Q. What road was it on? A. Missouri Pacific.

Q. Do you know whether or not it was a Missouri Pacific train? A. Yes, I know positively it was a Missouri Pacific.

Q. What was your purpose, Hayes, in going down to watch the train as you did? A. Well, we had some information about some boxcars, and I went down to see if there was a couple on that train.

Q. You were looking for particular box cars? A. Yes, sir.

Q. And did you observe them on that train? A. Yes.

Q. Then where did you go? A. Then we went back on Minnesota Avenue to 10th Street, south

on 10th to Central, and went across Central Avenue when I heard a voice, and I turned around and recognized Gladsen, and I stopped the car, and he got in; and we went on down to Red Loar's house and we got Red.

Q. You got Red at that time? A. Yes.

Q. What shape did you find Red in when you got to his house? A. Well, we didn't find Red. Gladsen and I stayed in the car and McCarthy went to the house.

Q. To Red's house? A. To Red's front door and knocked. It was ten or fifteen minutes before Red was ready. He said he was in bed when he come back to the car.

Q. Had you got any guns by that time? A. No, sir.

Q. Had no guns at that time; none of you? A. No, sir.

Q. Did you procure any guns that night? A. Later on, yes.

Q. Was that after Red joined you? A. Yes, sir.

Q. Where did you get those guns? A. Got them at Gladsen's house.

Q. Got them at Gladsen's house? A. Yes, sir, on South 13th Street; about 833 South 13th Street; somewhere along in there.

Q. That is after you picked up Loar? A. After we picked up Loar on the way up. On the way out to Gladsen's house we stopped at Ferry and Osage at McCarthy's sister's place. He went on the front porch and got a pair of overalls and jumper he had there. We went on to Gladsen's house.

Q. That was Ferry and Osage? A. Ferry and Osage.

Q. Where did you stop at that time with reference to the house? A. Well, the house sat on the corner of the alley; we stopped on the street. We could see him all the time.

Q. Was he in the house at that time? A. No, he was on the front porch.

Q. How far away from the car did he go? A. Quite aways I judge, 60 yards I judge.

Q. About 60 yards away from the car. How long was he away from the car at that time? A. About as long as it took him to walk that far.

Q. Were you familiar with those streets out there? A. Yes, pretty familiar.

Q. Do you know whether or not his sister had a telephone? A. I do not know that.

Q. You do not know that? A. No.

Q. What was her name? A. Why, her name was, I do not remember what her name was now.

Q. Then where did you go, Hayes? A. Then, we went to Gladsen's house.

Q. That is after you left the sister's house you went to Gladsen's and got the guns? A. Yes.

Q. How many guns did you get there? A. Got two pistols.

Q. Who carried them? A. McCarthy carried one; Gladsen the other.

Q. Get anything else there? A. Oh, yes, we got an iron bar.

Q. What did you intend to use the bar for? A. We used it to open boxcar doors with.

Q. Then, where did you go? A. Then we drove to Leavenworth.

Q. What time did you get to Leavenworth? A. About,—somewhere around eleven o'clock.

Q. Where did you drive to in Leavenworth? A. Why, I drove to the eastern part of town and southeastern part of town and stopped at an old sugar refinery, there on a little creek bridge.

Q. Was that near the Missouri Pacific tracks? A. Oh, it was about half a block, I guess.

Q. Do you know whether or not this train had come up at that time? A. No. We knew the schedule pretty well; we knew it hadn't.

Q. Had you committed any robberies at that place before? A. Yes, several.

Q. Had you ever committed a robbery on this particular train? A. Yes, several times. They call it the same train; it makes the same time; they call it the same train.

Q. Do you know where the train makes up to start? A. Yes, sir.

Q. Where? A. East Bottom.

Q. Over in Kansas City, Missouri? A. Yes, sir.

Q. I do not know what you answered as to whether the train had come in at that time? A. No, it hadn't come in.

Q. Do you know about what time you left Kansas City, Kansas? A. Well, somewhere around ten o'clock.

Q. What time did you get to Leavenworth? A. Eleven fifteen or eleven twenty.

Q. Just go ahead now, Hayes, in your own way and tell what you know about what took place at Leavenworth? A. Well, the train whistled about twelve o'clock or somewhere along there.

Q. Yes. A. McCarthy and Gladsen got out of the car. We left, Red Loar and I and that is all I know about it.

Q. McCarthy and Gladsen got out of the car? A. Yes.

Q. Well? A. Loar and I drove to Leavenworth, drove to a restaurant. I forget the name of the restaurant. We were to meet there in the town but we drove to the other end of town, and I was to wait for them up there.

Q. What was the plan? How did it happen, Hayes, you were to meet them at the other end of town? A. Well, we got—we planned to rob the box cars on this south end of town, and get the stuff ready, then throw it out in the north end of town; and that we could meet there and take—and take them on back to Kansas City.

Q. At a particular crossing? A. Yes, sir.

Q. In the north end of town. Did you drive to that crossing? A. Not at first no. We drove to a restaurant first, because we knew there would be a delay in the yards of about fifteen or twenty minutes.

Q. Did you finally reach the crossing? A. Yes, sir, we finally reached the crossing and waited until the train went thru. Nobody showed up, so we drove back, Loar and I drove back down to this mill again. Nobody showed up there. Then we circled around for half an hour just going every place. Nobody showed up, so we started to Kansas City, and then on the Kansas City Victory Highway we picked—they hollered along side of the road; they seen us coming. We stopped and took

them to Kansas City. That is all I knew about it. That is all there was to it.

Q. Then, when were you arrested after that? A. I was arrested next day at ten o'clock; I mean two o'clock.

Q. Hayes, during the afternoon or evening of this day prior to the killing of David on this trip you have told us about were you, or any of your gang you know anything about, watching McCarthy? A. No, sir.

Cross Examination by Mr. Hackney.

Q. How many times have you testified as to the facts pertaining to this killing of David and your previous arrangements and conduct? A. Three times, I think.

Q. When and where have you testified previously? A. Oh, testified first at Gladsen's trial, Leavenworth.

Q. Yes? A. Second at my own, and now here.

Q. This is three times? A. Three times.

Q. How many times have you been interrogated where you agreed to give a full statement of the facts, not as a witness, but called in examination? A. How many times?

Q. Yes. A. Oh, several times.

Q. When you testified in your own case when you were convicted, did you testify the truth, or tell anything but the truth? A. Well, I guess so.

Q. Was your recollection better then than it is now? A. Yes, sir, I would imagine.

Q. Now, calling your attention to your testimony as reported by Mr. Tharp, who is now taking this deposition; and by the way, your father was present at your trial, was he not? A. Yes.

Q. And when you testified? A. Yes, sir.

Q. And calling your attention to the statement, page 3: "You went home to supper, did you? Yes. Where do you live? 725 South Key street. You lived there with whom? My father."

Q. You testified to that? A. Well, I went somewhere for supper.

Q. Then: "You saw Harry McCarthy after supper? Yes."

Q. You answered that? A. Yes.

Q. Then you testified to having seen him at Riley's place. A. Yes, sir.

Q. Now then, do you remember testifying in your trial that after taking Masterson up to the doctor that he didn't find the doctor as you have said here and that he wanted to go back again. That is correct? A. Yes, sir.

Q. Now after that do you remember testifying that you left Masterson and McCarthy both down town and you went to your mother-in-laws? Here is the question: "Did you leave Masterson there and go someplace else? I left Masterson and McCarthy both there. And where did you go? I went out to my mother-in-laws. Where does your mother-in-law live? I do not know what the name of the street is."

Q. Do you remember that you testified to that? A. No, sir.

Q. You do not remember that?

Mr. Seacat: Let me put in the record, plaintiff objects to this manner of cross examination. May the record show we object to that method of cross examination, using a document or record.

Mr. Hackney: Yes, you can make that objection at any time.

Q. I will call your attention to the other testimony right following the last answer you gave about going to your mother-in-laws. "What happened? Went to Minnesota Avenue; to 10th and Central; to the railroad tracks and to the Union Pacific."

Q. Did you testify to that? A. No, I didn't.

Q. Then again: "When did you next see McCarthy? Why, after I took my wife and her sister out to my wife's sister's place, and took my wife home and went back and picked up Masterson and brought him along."

Q. Do you remember making that statement? A. No, may have done it.

Q. The next question, do you remember this: "Where did you meet McCarthy? He was in front of the doctor's office."

Q. Did you testify to that? A. I do not believe so.

Q. You do not recollect that? "Did you pick him up there then. Yes, I picked him up then."

Q. Do you remember that? A. No, I do not.

Q. Now, did you testify that McCarthy went down to Third and Minnesota? A. Yes, sir.

Q. At what time of day did you testify he went down there? A. Well, that was about somewhere in the evening, I guess about 8:30, or somewheres—

Q. Then, do you remember that you were asked this question: "Did the train pass there? There were some box cars moving; I presume it was a train."

Q. Do you remember making that answer? A. Yes, sir.

Q. Next question: "Was there anything said, any plan about robbing a train that night by you and Harry McCarthy? No, sir, not me."

Q. Do you remember testifying to that? A. No, sir, it had been planned.

Q. Did you make that answer that is recorded there? A. I do not remember it.

Q. You do not remember it? A. No, sir.

"What was said about the train? There was nothing said about robbing the train. He says, 'You might ride me around awhile tonight.'"

Q. Do you remember that question and that answer? A. No, I don't.

Q. You do not remember that? A. No, sir.

Q. Is that what he said to you that "You might ride me around awhile tonight?" A. Well, that would be—

Q. Didn't he say that there? A. I do not remember.

Q. Now then, didn't you go on and testify; you were asked if you run a regular express business, and you said "Yes." Do you remember that answer? A. Yes.

"You had been hiring your car out? Certain occasions, yes, sir."

Q. Do you remember that answer? A. Yes.

"What happened there then; what else did he say about your car? He wanted to know if he

could have the use for this evening, and I said, 'Yes.'"

Q. Is that correct? A. Yes, sir.

Q. Do you remember the next: "Then what happened next? Then he says, 'Let's go back up and see if Charley has got out of the doctor's office yet.'"

Q. Do you remember making that answer to that question? A. No, I don't.

Q. Now, I will ask you if you didn't then testify after stating who Charley was, Charley Masterson: "Just go ahead Lawrence, in detail and tell as well as you remember what happened from this until the time your car came up to Leavenworth?"

And your answer: "Well, I stopped at the drugstore. I stopped to get Masterson. The doctor had not come. The doctor was an operating physician at Bethany Hospital and he left word with the druggist he might be back at his office within an hour, so Masterson says, 'I am going to wait,' so I presume he waited, so McCarthy says, 'Let's go to Armourdale.' It was right on the way home so I did not know what else to do, so we went down thru Armourdale on 10th Street. It is a good street. More traffic takes that than any other street. For that reason I always go down 10th. I went down 10th Street. As I was approaching the intersection of 10th and Central I heard McCarthy holler, he says, 'There is Bert back there.' So I reached and got the emergency brake and brought it to a stop in the middle of the car tracks on Central Avenue. So Bert came and got into the car and we went to Armourdale. So

McCarthy and Bert were talking about something I could not quite catch. They did not seem to be talking in an undertone, nothing like that. McCarthy said, 'Let's go down and pick up Red.' So I drove towards Red's house. McCarthy got out and went up to his front porch, and I heard a lady's voice. I do not know who it was, whether it was his wife's or his sister, or who it was. I heard the lady say he would be there in a minute, so when he come back McCarthy said, 'Drive to Bert's house' and I drove to Bert's place. Bert went inside and came out carrying a Jacket out. That is all I seen him carry out. McCarthy said he would make it right with me if he made some money. We come out and he directed around thru these roads and pretty soon we stopped at a place. I do not know where we stopped."

Q. Now, do you remember making that answer? A. Yes, sir.

Q. That was true, was it not? A. Yes.

Q. Just the answer, all of the answer I have read? A. Yes, sir.

Q. You were asked to identify a gun and you said you didn't have any gun. Didn't you then testify on examination like this: "You do not know the streets here in Leavenworth. No, sir. You do not know where you stopped at? A. No."

Q. 'Did you make that answer? A. Yes, sir.

Q. This question: A. I later found out where they were at.

Q. Now, then this question: "What happened when you did stop? Why we stopped there possibly five minutes and somebody said something about a car coming so Harry says, 'Let's

go that way.' So we went that way, that is the way he pointed. We went down that way possibly two miles. He says, 'Turn around, let's go back.' and we went back. We stopped there. So waited there for I guess 35 or 40 minutes. Then I began to notice something queer, something odd. I did not think when we started that we were going to come up here to steal. When they heard this train whistle Harry and Bert got out of car. Red Loar and I stayed in there. Presently Bert came back and whispered something in Red's ear. I did not know at the time what he whispered, but Red said they were coming up, that he was a detective. That is what Bert told him; that he was going down here to pilfer this train or whatever it was. And so when they left there I got sore at them. I said, 'If you are coming up here to steal I am going home.' Red and I stood there debating for awhile. Pretty soon I pulled out.''

Q. You made that answer to that question? A. Yes.

Q. It was true? A. Yes, sir.

Q. Then you didn't go up there with the idea of stealing anything? A. Well, yes, we knew we were going up there to steal.

Q. Why did you testify you were angry when you heard they were coming up here to steal? A. Well, we had to beat the case you know. We figured we had to beat the case.

Q. You figured you had to beat the case. You just told that to beat the case, is that it? A. Yes, we wanted to make it look good our way.

Q. Is that your reason for making that answer? A. Yes.

Mr. Seacat: Let me ask please, from what you are reading.

Mr. Hackney: I am reading from the official transcript of the stenographer who took the testimony, and is taking the testimony here now.

Mr. Seacat: On what trial?

Mr. Hackney: The trial of his own case.

Q. Do you remember—it is the direct examination by Mr. Kelsey, his lawyer. Do you remember that? A. I do not remember just word for word.

Q. That is the substance. That is correct, all I have read here, is it? A. I do not know. I do not remember now.

Q. Now, did you hear any shooting up there? A. No, sir.

Q. Didn't hear any shooting? A. No, sir.

Q. Didn't you know David was killed? A. No, sir.

Q. You remember when you were tried up here at Leavenworth? A. Yes, sir.

Q. Now, do you remember who it was that cross-examined you? What lawyer, the county attorney? A. I believe it was.

Q. Mr. Bond? A. I do not know. I believed it was Endres.

Q. Well, anyhow, you were asked a question about going down and looking at a train down there that night, presumably this train you have been talking about, and didn't the attorney on cross examination ask this question: "Was that what you were looking for, a string of box cars."

Q. And your answer: "He asked me to go with him. I had no idea what he was going to do"

(referring to McCarthy). A. I do remember that question.

Q. The next question: "Then you came back and got in your car? A. Yes."

Q. Question: "Then he asked you to hire your car? He said he would make it right with me if I would drive him around awhile."

Q. You testified to that in your trial? A. I do not remember.

Q. Now, you were asked also this question, that after Harry suggested you stop and get Masterson: "Then what did Masterson say? They went into the drug store, I think."

Q. Do you remember testifying to that? A. No, sir, we all went into the drug store. "Masterson could not go because the doctor had not come, is that not true? I do not know."

Q. The next question: "Didn't you hear him say so? Harry was talking to him in front of the drug store. I was waiting across the street."

Q. Did you answer that? A. I do not believe so.

Q. Was that the fact? A. I do not remember the question even.

Q. You do not remember that question and that answer? A. No, sir.

Q. Now then, Hayes, you knew Bert Gladsen real well, didn't you? A. Yes, sir.

Q. You knew he was a bandit? A. Yes, sir.

Q. Highway-man? A. Yes.

Q. Bank robber? A. Yes.

Q. Payroll robber? A. Yes.

Q. And a train robber? A. Yes.

Q. How long had you known that? A. Well, I didn't know it very long. I knew it, I guess, six or eight months.

Q. Do you remember about two weeks before that night when David was killed in a train robbery at Walcott? A. Yes, sir.

Q. You were in that, weren't you? A. Yes.

Q. How many of these men were in it (reading)? "Bert Gladsen, Red Loar, George Riley, Hobart Ward, Freddie Thompson, Lawrence Hays, (yourself) John Rock, Sunny Davis, and George Oftener (spelling)." A. That is correct.

Q. You had how many automobiles? A. Two.

Q. How many cars did you rob? A. The whole train I guess.

Q. You stood the brakeman up against the telephone pole and one man held a six shooter or rifle on him while the other men were robbing the train? A. I do not know. I was driving the car. I was out in the road.

Q. You could see the boys who were doing that? A. Yes.

Q. They held up the brakeman and made him stand still at the road crossing? A. Yes.

Q. Loaded the stuff in the trucks and got away? A. Yes, sir.

Q. That was the night of May 2nd? A. Yes.

Q. Two weeks before you boys went up there and had this robbery at Leavenworth, or attempted robbery at Leavenworth? A. Yes, sir.

Q. Now, David was not on that train that night? A. I do not know.

Q. There were two train riders? A. Yes, sir, there were two train riders.

Q. The Missouri Pacific was having two train riders most of the time? A. Yes, sir.

Q. Don't you know one of the train riders had got left and there was only one on the train that night? A. No.

Q. And he was out in front watching— A. There was two train riders. Both train riders were in the rear.

Q. They were both in the rear? A. Yes.

Q. McCarthy was not in that bunch? A. I think he was.

Q. Don't you know he was not there? A. No, I don't believe he was either.

Q. Bert Gladsen was tried and given a life sentence? A. Yes.

Q. For the murder of David? A. Yes.

Q. And McCarthy testified on his trial? A. Yes.

Q. That Gladsen was the man shot David? A. Yes, sir.

Q. And McCarthy also testified in the trial against you, didn't he? A. Yes, sir.

Q. Don't you know the question was asked McCarthy why he didn't report the intended robbery of this train in one of those trials? A. Yes.

Q. He testified to that. Red Loar was given a sentence for how many years? A. Thirty-five years.

Q. Thirty-five years. You were given a sentence of how many years? A. Thirty.

Q. How many? A. Thirty years.

Q. Now then, did you ask Mrs. David recently to assist you in getting your sentence cut down, you, Gladsen and others? A. Not me, no, sir.

Q. Did you know if it was being done in your behalf? A. No, sir.

Q. And that she had consented to do it? A. No.

Q. When was it taken up with you about testifying here? A. Six or eight months ago.

Q. Who talked to you about it? A. Two or three years ago.

Q. Two or three years ago? A. Two or three years ago Tolbert talked to me.

Q. Coming back to that, do you remember on Sunday, January 20, 1924, that you were in the office of G. M. Stringfellow, Sheriff of Leavenworth County, at Leavenworth, when you were questioned by some gentlemen? A. Yes, sir.

Q. Now I will ask you if these men were not present: "Honorable Charles G. Griffith, Attorney General; Mr. Roy R. Hubbard; Mr. L. S. Harvey, Mr. Hayes, your father; Mr. J. N. Baird, County Attorney?" A. Yes, sir.

Q. And you made a statement? A. Yes, sir.

Q. And your statement was taken down by E. S. Massey, shorthand reporter? A. Yes, sir.

Q. Do you remember what was said before they asked you to make a statement? A. No, I don't.

Q. That was after your case had been disposed of in the Supreme Court, and you were there to be dressed into the penitentiary, weren't you? A. Yes, sir.

Q. And didn't you undertake to tell the truth on that occasion? A. Why, I told the truth, I think, as close as I could.

Q. As close as you could from your best recollection? A. Yes.

Q. Now, I am going to ask you to look at this document I have, and read that commencing at the first; read the first page. A. (Examining.)

Q. You have looked over a part of that? A. Yes.

Q. You recognize that as being a report of your statement? A. Yes, sir.

Q. Now, I will ask you if you remember on that occasion that you undertook to tell the Attorney General, who was examining you, what different robberies you had been in, and you told him of several? A. Yes, sir.

Q. And first you told him about robbing the Central Avenue Bank across from Armours? A. Yes.

Q. And that you and Hobart Ward and George Riley were on that robbery? A. Yes, sir.

Q. And that you testified you and Riley stole a car from Miss Mary Kline to do the robbery? A. A Nash car.

Q. And do you recollect you told how much money you had gotten in that robbery; how much was divided; do you remember that? A. Yes.

Q. Then you told him of the Wilson payroll robbery, which was pulled off by you and Riley and Hobart Ward? A. Yes, sir.

Q. And in that payroll robbery you took how much money, do you recollect? A. About $5500.

Q. $5400 and some odd dollars, was it not? A. Yes.

Q. Then you told him of some other robberies, and how the money was divided, and then he directed your attention to this attempted robbery of the Missouri Pacific train—before I get to that; you told him about the Turner bank robbery, also, did you not? A. Yes, sir.

Q. How much money did you take? A. $2250.

Q. Who was in that out there? A. Gladsen I believe.

Q. Gladsen? A. Masterson and myself.

Q. Gladsen, Masterson and yourself; and that you took the money to Riley's house on that occasion and divided the money. Now then, coming down to the attempted robbery of the Missouri Pacific in question, don't you remember the Attorney General Mr. Griffith asking this question: "Now, referring to the case on which you were convicted, who was with you on that case?"

Q. And you answered: "Harry McCarthy and Bert Gladsen and Nathan Loar."

Q. Do you remember making that statement at that time? A. Yes, sir.

Q. This referred to that attempted robbery at Leavenworth that night? A. Yes, sir.

Q. Now then, I will read you the next question by the attorney general: "Riley was not with you on that? A. No, sir."

Q. (reading again) "Who framed this affair?"

Q. And you answered? "Well nobody framed this affair. At Bert's request we started out so he could get some money; he didn't have none, that is, I took Red Loar out."

Q. Do you remember making that answer? A. No, it don't sound right.

Q. And you were asked: "At whose request? A. At Bert Gladsen's."

Q. Do you remember making that answer? A. No, sir.

"At Bert Gladsen's request you took Loar out. Where did you meet? A. Started to take him out."

Q. Did you make that answer? A. I do not remember.

Q. The next question: "Didn't you know where you were going before you went? Well, I didn't know the roads very well; I was only up here one time."

Q. Do you remember that answer? A. Yes, sir.

Q. "Here" referred to Leavenworth, did it? A. Yes, sir.

Q. (Reading) "Did you know what you were going after? No, sir; we didn't have anything in particular."

Q. You made that answer, didn't you? A. Oh, well, I do not remember whether I did or not, but we never had anything in particular.

Q. Didn't General Griffith say: "Sir? There was nothing in particular, just wanted to rob some box cars."

Q. Is that the answer you made? A. Yes.

Q. (reading) "Where did you start from to this place where this man was killed? Started from Riley's house."

Q. You answered that, didn't you? A. Yes, sir.

Q. "All right. How did you happen to be over at Riley's house? Oh, we all went down there and hang out down there."

Q. You answered that? A. Yes.

Q. Now, you were asked: "When you went down to Riley's house did you know that you were going out on this work?" A. Repeat the question.

(Question reread.) "Not until later on, until Bert told me that Red was broke and needed some money."

Q. Didn't you make that answer? A. I do not know. That might have been so.

Q. That is you may have made that answer. You do not say you didn't. If you answered it it was true, was it not? A. Yes.

Q. Do you remember answering this: "You went down to Riley's house the night before this man was killed here in this county? The same night."

Q. Do you remember that? A. Yes, sir.

Q. "The same night. And who was there at Riley's house? Harry McCarthy, Bert Gladsen and I drove up there, and Harry McCarthy and Riley and Ward and Thompson was all in there."

Q. Do you remember that? A. Yes, sir.

Q. (reading) "That is Fred Tnompson? Fred Thompson."

Q. Do you remember that? A. (No response.)

Q. (reading) "You have named all that were in the house? I think yes, that is all, besides his mother."

Q. Now then notice this, didn't he ask you this: "At the time you went over there you hadn't any idea about this particular deal? No, sir. I never had talked—"

Q. Do you remember saying that much? A. No.

Q. "I never had talked." A. No, I do not remember that.

Q. You do not remember making that? (reading) "Anyone come while you were there? I believe a fellow by the name of Phillips came while we were there."

Q. Do you remember making that answer? A. Yes.

Q. (reading) "What is Phillips' name? His name was, I don't know, he is a special agent for—Charles Phillips, special agent for the Santa Fe."

Q. You answered that? A. Yes, sir.

Q. Do you remember you went on to tell about some understanding with Phillips to keep off the Santa Fe? A. Yes, sir.

Q. He used to be a Missouri Pacific special agent? A. Yes, sir.

Q. Do you remember this question being asked you: "Now, the night you were at Riley's house what was the first thing said to you and by whom about this deal that you are now convicted of?"

Q. Listen to this: "A. Riley said there is Camels going out on the Mop tonight. I don't know where he got the information; I suppose he got it from Phillips."

Q. Do you remember that answer? A. Yes.

Q. (reading) "What do you mean by that? I don't know how he got the dope they would be any cigarettes going out that night. Riley got a tip that there was some cigarettes on this Missouri Pacific train but I don't know how he got the tip, whether he got it from Phillips, or who he got it from; I suppose he got it from Phillips."

Q. Do you remember that answer? A. Yes, sir.

Q. That was true, was it not? A. Yes, sir.

Q. Then the next question? "What was said about you going out?"

Q. And you answered: "Gladsen told me, 'Let's get Red Loar,' and Harry McCarthy was there, and he was crying; always crying to come up here; they wanted to go some place on the Missouri Pacific and I never had gone with them no place and Riley said it was all right, so he says, 'Take him along,' so he wanted to go—"

Q. You answered that? A. I do not remember.

Q. Is that a correct statement about the matter, that McCarthy wanted to come up, and you boys decided to go up, and Riley told you to go and take him along? A. No, it was not that way.

Q. That is not correct. (reading) "Was he a younger man or older man that you are? He is 30 years old or 28 or something like that. So,

he says, 'Take Harry and Red and Bert and go up and make that train.' ''

Q. And you answered General Griffith— A. I do not remember now.

Q. Well, is that not a fact? A. Well, I do not know.

Q. Your memory was better in 1924 than it is now? A. I imagine so.

Q. You were trying to tell the straight of it at that time, weren't you, Lawrence? A. Yes.

Q. Now then, didn't he ask you these questions: "Harry and Red and Bert, give me their other names? Harry McCarthy and Red Loar and Nathan Loar and Bert Gladsen and myself."

Q. That is correct? You remember making that? A. Yes, sir.

Q. Then: "Did he tell you car to take? No, I took my own car."

Q. That is correct, is it? A. Yes.

Q. (reading) "Was it arranged for you to take your car? No, sir, I suppose when he said, 'Take them' he meant take them in my own car."

Q. Do you remember that answer? A. Yes, sir.

Q. Now this question: "Was there any understanding just what they were going to do at that time?"

Q. Answer: "Well, not exactly. They says, 'There is some Camels going out on that train.' We says, 'All right.' "

Q. Do you remember that answer? A. Yes, sir; there is always Camels on that train.

Q. (reading) "That is about all you knew about it when you started? That is all I knew, yes."

Q. You answered that, didn't you? A. Yes, sir.

Q. That was true, was it not? A. What was the question?

Q. (reading) "That is about all you knew about it when you started? That is all I knew, yes."

Q. That Riley had told you there was some Camels going out on the train and for you to take the boys and go and make the train. That is all you knew about it at that time? A. That was in the early afternoon—four o'clock?

Q. No, that night just before you started out? A. No, that was four o'clock in the afternoon.

Q. You were up in the courthouse at four o'clock? A. That was down at this place.

Q. At Riley's place you say. After you had been around town you went down and he told you to take these boys and go down, didn't he? A. Well, I do not remember.

Q. You do not remember? A. No.

Q. But you were trying to tell General Griffith the truth, weren't you? A. Why, yes.

Q. Your answer was taken down just as you said it? A. Yes.

Q. You know that, don't you, Hayes? A. I do not remember what testimony he got there.

Q. You remember the court reporter? A. I do not know whether he was a court reporter or not.

Q. You know Massey, E. S. Massey, shorthand reporter, do you not? A. Yes, I know him.

Q. And didn't you say: "You went in your car? Yes, sir. And the three men that you have named were with you? Yes, sir."

Q. Do you remember making that answer? A. Yes.

"Where did you go? We went up on 10th and Minnesota and got a tail light bulb, the tail light burned out."

Q. Did you answer that? A. Yes.

Q. That was a fact? A. Yes.

Q. And you testified you got a tail light bulb? A. Yes, at 10th and Minnesota.

Q. That was on that night? A. Yes.

Q. That is after you started out from Riley's house, when you said McCarthy was crying about wanting to go along with you, and Riley said, "Take him along." A. Well, he was always crying about that, perpetually. He wanted, he always wanted to make some money.

Q. Crying perpetually. You were arrested in Charles Thompson's office? A. No, sir.

Q. Where were you arrested? A. Arrested at Kansas Avenue.

Q. What? A. Packard and Kansas Avenue, Kansas City, Kansas.

Q. You were not in the fracas when the agent was shot at Osawatomie? A. No, sir; I was not in that.

Q. That was Gladsen. Now, you had no motive in secreting anything when you testified for the Attorney General? A. No, sir.

Q. Your recollection was better then than it is now? A. Not much better. I can remember what went on.

Q. How many other robberies than you have named here had you been in? A. Oh, numerous, numerous.

Q. How many years had you been a common thief and bandit, a highwayman and a murderer? A. Well—

Mr. Seacat: Let the record show I object to that question, assuming here that this man was a murderer. That is an unfair question, Mr. Hackney.

Mr. Hackney: He can answer.

A. I have not been a murderer until I was convicted on this charge.

Q. That was the only charge of murder you have been convicted of? A. Yes.

Q. Never been convicted before? A. No, sir.

Q. How many highway robberies have you been in altogether; so many you could not keep track of them? A. No, not that many.

Q. How many bank robberies have you transported to? A. Four or five.

Q. How many payroll robberies? A. Two or three.

Q. How many ordinary stick up cases, holding up people on the street? A. Not many.

Q. You were engaged in that occupation? A. No, I never did rob a man on the street.

Q. You were in company with those who did? A. No, sir.

Q. Did you rob any stores? A. No, sir.

Q. You helped rob the Santa Fe? A. Yes.

Q. How many times? A. Oh, we didn't rob the Santa Fe much; two or three times.

Q. How many times altogether did you rob the Missouri Pacific? A. I have not got—too many—I do not recall.

Q. How many train riders were usually on a train? A. At first there were not any—maybe one; maybe none, but later on—

Q. In the last few years previous to the time David was killed? A. Well, two or three.

Q. Did you know a train rider named Boyd? A. Yes.

Q. You knew David, didn't you? A. No, I didn't know David.

Q. Did you know if Gladsen had some grudge against David? A. No, sir.

Q. You didn't have any grudge against David? A. No.

Q. You did not know Gladsen was going down to kill him that night? A. No.

Q. You boys had not made up a plan to kill anybody? A. No, we never done that.

Q. The guns were taken along to scare somebody? A. They were not taken to kill anybody.

Q. Did you have a gun yourself, you say? A. No, sir.

Q. You didn't have any gun? A. No, sir.

Q. The only thing you boys talked about in your various ~~talks~~ was about going down and robbing boxcars? A. Well, yes, we would go down and rob boxcars.

Q. You never planned to go down and murder train riders? Did any of your gang have a grudge against David at all? A. Well, I do not know.

Q. You had not heard of anybody—he had not shot any of them, had he? A. Yes.

Q. Who did he shoot? A. I do not know whether he shot anybody or not, but two or three months before that we had a shooting scrape at Nearman, Kansas.

Q. David was in it? A. I do not know. It is the same train. I do not know whether he was on it or not.

Q. Was anybody hit? A. Well, Masterson was hit four or five times.

Q. That was about how many nights before this occurrence when David was killed? A. A month I guess.

Q. It was a month before? A. Yes.

Q. David was a train rider a month? A. I do not know. I do not know how long he had been riding the train. I do not know anything about that. I do not know he rode it at all. I did not see him.

Q. Who did the shooting at Nearman? A. I do not know; the bulls did the shooting.

Q. Train riders, you mean? A. Yes.

Q. What do you call them, "Bulls?" A. Yes, sir.

Q. Did the thieves do the shooting? A. Well, I do not know.

Q. Were you armed that night? A. No.

Q. Who did have fire arms? A. Well Gladsen and Masterson had arms.

Q. McCarthy was not with you that night, was he? A. No, sir.

Q. Now, you testified on your trial that you did not know you had gotten to Leavenworth until you got there? A. Well, we had planned to rob the Missouri Pacific at that time. We planned to rob the Missouri Pacific pretty near every time we would go anywhere.

Q. You told the truth to Attorney General Griffith when you said Gladsen that night at Riley's house mentioned he was broke; also mentioned Red Loar was broke and wanted some money, and at that time you decided to go out and rob a car; is that a fact? A. Yes, because they just got out on appeal bond; it was understood they were broke; we knew they were broke.

Q. The talk you had with McCarthy when you started out was you were going to rob some box-cars; you didn't know just what box cars you were going to rob? A. He suggested—he suggested the Missouri Pacific himself.

Q. He suggested that to you, but you hadn't made any plan to rob any particular train until you started from Riley's house? A. Until we went down to the foot of Minnesota Avenue. We didn't know we were going to rob that train then.

Q. Why didn't you testify about that in there (indicating)? A. I did testify to that.

Q. Why didn't you tell that to General Griffith? A. I believe I told him that.

Q. How? Don't you know you testified you had no plan about robbing until you were down to Riley's house, and you were all together, and Riley says, "Take the boys and go in your car?"

A. Well, you see, I do not know that is the same testimony.

Q. You were trying to tell the truth—had as much motive to tell the truth in the presence of your father as you have in this case? A. Why certainly.

Q. When did Tolbert talk to you first? A. Two years ago.

Q. Were you here at the time Gladsen's deposition was taken? A. Well, I been here all the time Gladsen has been here.

Q. Gladsen's deposition was taken sometime over a year ago? A. I was here.

Q. You were here at that time? A. Yes.

Q. You were not called to testify that day? A. No, sir.

Q. Now, has anybody talked to you since that time? A. No, sir.

Q. Did you know Mrs. David wrote a letter to the Governor and asked for clemency for you boys? A. I do not remember nothing about it.

Q. You do not remember nothing about it? A. No, sir.

Q. Who handled the matter for you, what attorneys? A. I have no attorney.

Q. Do you know somebody down at Kansas City, or elsewhere who is looking after this matter —if, so, who it is? A. I do not know.

Q. Did anybody talk to you about making a statement? A. In regard to this case?

Q. Yes. A. Well, Mr. Seacat here.

Q. When? A. A week ago.

Q. Is that the first time you talked to anybody about the case? A. No, I talked to Bert about it.

Q. Bert Gladsen? A. Yes.

Q. Did you talk with Bert Gladsen after his deposition was taken? A. Yes.

Q. He told you what he had been asked, and what he testified? A. No, he didn't mention it.

Q. He didn't mention it? A. He just said—he told me—

Q. I am not asking that. I asked if he told you what he testified to? A. No, no.

Q. He didn't tell you what his testimony had been? A. Not calling for any statement.

Q. So you do not know what his testimony was? A. No, sir.

Mr. Hackney: I submit first Mr. Tharp's certified transcript.

Mr. Seacat: The only point is this: I don't want to encumber this deposition.

Mr. Hackney: I will have it marked "A" and attached to this deposition. I offer it as a part of the deposition. The other transcript I will have marked "B."

Mr. Seacat: That other may be a horse of a different color, Mr. Hackney (examining). It may be like Lincoln's almanac. It may go in for what it is worth. I have no objection to Exhibit "A."

Q. There is another question. Do you remember the result of your application for reduction of your sentence? A. What was the result?

Q. Yes, before the board of parole? A. I have never been up for executive clemency.

Q. Didn't you get a reduction of your sentence? A. No, sir.

Q. Did Gladsen? A. Yes, sir.

Q. Do you know what the reduction was? A. Yes.

Q. What was it? A. To fifteen years.

Q. Reduced from life sentence to fifteen years? A. Yes, sir.

Q. Do you know what Red Loar's reduction was? A. He never got a reduction.

Q. He never got a reduction. That is all.

Re-Direct Examination by Mr. Seacat.

Q. Mrs. David has never done anything in regard to helping you get a reduction of your sentence, as I understand it? A. No, sir.

Q. In the conversation with Mr. Tolbet and in the conversation with me, was any promise made to you that Mrs. David would assist you in getting your sentence reduced? A. No, sir.

Q. Do you have any motive in testifying at this time other than to tell the truth and facts as you now recall them? A. No, sir.

Q. How long has this gang been in operation, Hayes? A. Oh, for years.

Q. For years? A. Yes.

Q. How long had McCarthy been associated with the gang? A. Well, I do not know just exactly how long, at various times.

Q. Is it not a fact that at the time of this taking place, McCarthy was under sentence on conviction, for robbing the Missouri Pacific? A. Yes, sir.

Q. This statement has called attention to purporting to have been taken by the attorney

general in 1924, the testimony or whatever statements you made to the attorney general at that time was reported in shorthand? A. Yes, sir, I guess. I do not know.

Q. You do not know about that. After that conversation was the transcript of that submitted to you for approval? A. No.

Q. You never saw that statement after it was written up? A. Well, yes, I saw it. It just dealt with one case of highway robbery.

Q. But that is a complete statement, Mr. Hackney has? A. No, I never got it, or signed it or anything.

Mr. Seacat: I believe that is all.

Re-Cross Examination by Mr. Hackney.

Q. How did you come to make that statement when your father was present, the attorney general was present and these other gentlemen they have listed on that statement? A. Why?

Q. What was said about the purpose of it? A. Well, the purpose of it was to clear up Charley Thompson's part that he played.

Q. Well, you asked your father to come and be present, did you not, when your statement was given or was it the attorney general? A. I do not know. I do not believe I asked him.

Q. He came there. And you undertook at that time to answer truthfully every question asked by the attorney general? A. Yes, sir.

Q. Now, then, Hayes, McCarthy testified against you, didn't he? A. Yes, sir.

Q. In the preliminary? A. Yes, sir.

Q. And in your final trial when you were convicted and given 30 years? A. Yes.

Q. You heard him testify in the other cases? A. No.

Q. You learned he did testify? A. Yes, sir.

Q. Did you hear him testify in Loar's case? A. No, yes, I believe he testified in Loar's case.

Q. You learned he turned state's evidence as you thought? A. Yes, sir.

Q. Against you boys and turned the gang in? A. Well, no, he didn't. He didn't turn state's evidence.

Q. He testified against you, didn't he? A. He testified he was an officer. He testified he was an officer for the Missouri Pacific.

Q. He testified against you in your trial? A. Yes.

Q. You heard him testify all these things about going up there? A. Yes.

Q. About you taking him? A. Yes.

Q. And they arranged down at Riley's house that night to go up there after Bert said Red was broke and he was broke, and wanted some money? You heard him testify to that? A. Well, it was arranged two or three times.

Q. You heard him testify to that? A. I do not remember now.

Q. Regardless of what he testified you did not feel very kindly toward McCarthy? A. Oh, no, you would not feel very kindly towards him.

Q. Bert was mad at him, was he not? A. Yes, everybody was.

Q. And so was Red Loar? A. Yes, they felt like me.

Q. The rule among men engaged in banditry, bank robbery, and payroll robbery is to "bump

off'' in the common language of the underworld, any man who squawks, is that not the rule? A. Yes, that is the rule.

Q. So word has been given out since the trial of yourself among your gang to get McCarthy, if you could do it, has it not? A. Not that I know of. I guess—

Q. Would you testify McCarthy's life would be forfeited if he was found with your gang, anyway around Kansas City, Kansas? A. I imagine so.

Q. It would not be safe for McCarthy to stay in this country? A. Well, he has not.

Q. You know that? A. No.

Q. You do not know where he is. You have not had any communication with him? A. No, sir, but I have heard from him several times.

Q. You heard from him? A. Various ways, heard from him.

Q. How did you hear from him? A. Well, I have heard through different people.

Q. Through some men who have been in banditry? A. No, through some of his friends.

Q. Most of your gang are in the penitentiary? A. Yes, sir.

Q. How many of them are left out of the penitentiary now? A. One.

Q. Who is he? A. Masterson.

Q. Masterson. He is the one got shot down at Walcott? A. Yes, sir.

Q. Or Nearman instead of Walcott? A. Yes, sir.

Q. He was going to the doctor for treatment at the time of this train—attempted train robbery

and David was killed, was he not? A. Yes, sir, at that time.

Q. At that time he was suffering from his injuries, yet? A. No, it was not concerning that case at all; no, he didn't suffer from—I do not know what he—

Q. Had his injury healed from the shooting? A. That was not what he was going to the doctor for at all.

Q. But he was not able to go out that night? A. Oh, he was able. He figured it would be better to stay and see the doctor.

Q. You did no other acts of robbery than this attempted robbery here in Leavenworth? You were then taken into custody and kept in custody ever since? A. Yes, sir.

Mr. Hackney: That is all.

Re-Direct Examination by Mr. Seacat.

Q. About the shooting at this train, where did you say it was, Mr. Hackney? A. Nearman.

Q. Where is that? A. Beyond Walcott about six miles.

Q. Between Leavenworth and Kansas City? A. Yes.

Q. When did it take place? A. A month or so prior.

Q. Do you know or understand David was riding the train at that time? A. No, I have no way of knowing he was riding the train.

Q. The train rider at that time shot Masterson? A. Oh, they didn't shoot him; well, yes, they shot him four or five times, but nothing—never hit him in a vital place; just scratched his arm.

Q. Had there been any other violence in the three months preceding this occasion? A. No, sir, not that I know of.

Mr. Seacat: That is all.

Re-Cross Examination by Mr. Hackney.

Q. You remember you said the night of the 2nd of May, 1923, just two weeks before this attempted robbery at Leavenworth, you and your gang were up robbing those cars at Walcott? A. But there was no act of violence.

Q. There was no shooting that night? A. No, sir.

Q. You just held a gun on the brakeman, then robbed the cars and took the goods away? A. Yes, sir.

Q. But everybody in your gang was armed? A. Yes, sir.

Q. Even yourself? A. No, I was not armed.

Q. You were not armed? A. No, sir.

Q. How far from the cars were you when the robbery was occurring? A. Oh, right across a little ravine, about thirty feet.

Q. About thirty feet. You could see what was going on? A. Yes.

Q. You had no lights? A. Flashlights.

Q. All sort of lights there? A. No, we didn't need no lights.

Q. It was a moonlight night? A. Well, it was pretty clear.

Q. You could see the boys robbing the train? A. I could see the figures over there.

Q. You could see one man standing up against a telegraph pole? A. No, sir.

Q. Some fellow holding a gun on him? A. No.

Q. You know that was a fact? A. They said something about that later on.

Mr. Hackney: That is all.

Re-Direct Examination by Mr. Seacat:

Q. On that train robbery you learned that the brakeman was alongside of the telegraph pole? A. I do not know. I was not there.

Q. That is what you understood after the robbery? A. Yes, sir.

Q. Kept him covered with a gun while robbing the train? A. I think they robbed the first five or six box cars anyway by the time—they pulled down two or three cars. Our cars were loaded.

Q. You do not know of the occasion of holding the brakeman up against the telephone pole? A. No, I was not there.

Q. You do not know whether he resisted on that holdup or not? A. No, I do not know anything about that.

Q. What was your attitude toward a train rider who did resist? A. Well, you see—I never had no attitude. I never did rob any box car myself. I just used my car for transporting the stuff.

Q. These guns these other men carried were loaded? A. I do not know. I presume they were.

Q. Did you understand they would use them if occasion presented? A. Well, that is my—I thought they would anyway, because if they didn't what would they want them for.

Q. They would shoot their way out of trouble if they got into trouble? A. Yes, they carried them anyway.

Q. That is the purpose of carrying the guns?
Mr. Hackney: I object as leading.
Mr. Seacat: I think that is all.
(Witness excused.)
(Signature waived.)

Transcript as certified by Clark A. Tharp, official reporter for Leavenworth County, Kansas, under date of March 21, 1928, and introduced in evidence by the defendant was to the following effect:

"I am Lawrence F. Hayes, age 21, and am one of the defendants in this trial; I have known Bert Gladson all my life. I had never been associated with him in any crimes prior to the night David was killed; about 6 o'clock, I went down to George Riley's house to help him mix some paint for his garage that I had built. Ten or fifteen minutes before 7 that night, I took Harry McCarthy, Bert Gladson and Charles Masterson in my father's car for the purpose of taking Masterson to a doctor. I left them at a drug store and went to my mother-in-law's and took several of them out to my sister-in-law's then went back to the drug store and picked up Harry McCarthy and we drove down to the railroad tracks and got out and walked down by where some box cars were passing."

"Q. Was there anything said, any plan about robbing a train that night by you and Harry McCarthy?" "A. No, sir, not me."

"Q. What was said about the train?" "A. There was nothing said about robbing the train, he says, 'You might ride me around awhile tonight.'"

"I had been hiring the car out occasionally and he asked me if he could have the use of the car that evening and I said he could and went along to drive it. We went back for Masterson but the doctor had not arrived so at McCarthy's suggestion we started for Armourdale. We accidentally came across Bert Gladson on 10th Street and he got in the car with us. There was considerable conversation which I did not hear, and we later drove around and picked up Red Loar and then drove to Gladson's house, where he went inside and came back carrying a jacket. McCarthy then said he would make it right with me if he made some money. They directed me where to drive and pretty soon we stopped at a place which was somewhere near Leavenworth but I did not know where we stopped. When another car approached we drove down the road a couple of miles and then came back and waited for 35 or 40 minutes. When we heard a train whistle McCarthy and Gladson got out of the car and presently Gladson came back and whispered something to Loar. I noticed something was wrong and said:

'If you are coming up here to steal, I am going home,' and Loar and I left there about 10 minutes later; we drove back through the edge of Leavenworth to the car tracks and started for Kansas City and was not thinking about meeting McCarthy and Gladson, but we met them on the road and they rode home with us. When we got about at White Church on the way home, I heard something about trouble and that one of the guards or detectives had probably been shot; I did not have anything to do with trying to rob

any car or killing Mr. David and did not know him and never had the slightest idea before we got up here near Leavenworth that they were coming up here to rob a train."

On cross-examination he testified:

"When we went down to the railroad tracks in Kansas City, Kansas, I had no idea what he was going to do but told him I would drive him around in the car that night and expected him to pay me for it. McCarthy was talking to Masterson in front of the drug store and I waited in the car across the street; then McCarthy and I started for Armourdale and picked up Bert Gladson on the way. About 9 o'clock we picked up Loar and then went to Gladson's house. Gladson went in the house and brought out some clothing but I did not see any gun. At McCarthy's direction we drove towards Bonner Springs and turned north at Muncie and took various roads as McCarthy directed through part of Leavenworth, but I did not know it was Leavenworth at the time until they told me."

Prosecuting Attorney thereupon offered in evidence transcript of Hayes' testimony several days before the trial of Gladson for the murder of David which said testimony tended to prove that the witness knew before they went to Leavenworth that the gang expected to rob freight cars. But the witness, after denying in part such testimony and saying he did not remember the same, reiterated that he did not know that they were coming to Leavenworth to rob box cars. Witness further testified that he never saw any re-

volvers and did not know any guns were in his car.

In the District Court of Leavenworth County, Kansas. The State of Kansas, plaintiff, v. *Lawrence F. Hayes, defendant.* No. 6326.

Reporter's Certificate.

I, Clark A. Tharp, official reporter for the First Judicial District of Kansas, do hereby certify that the above and foregoing is a true, full and correct transcript of all of the evidence of Lawrence F. Hayes, taken by me in shorthand upon the examination of said witness in open court upon the trial of the above entitled case, which was begun on May 7th, 1923; said testimony of Lawrence F. Hayes was given on May 8th, 1923.

Clark A. Tharp,
Official Reporter, Leavenworth, Kansas.

"Report of a conversation on Sunday, January 20, 1924, in the office of G. M. Stringfellow, Sheriff of Leavenworth County, Leavenworth, Kansas."

Dated this 21st day of March, A. D. 1928.

LAWRENCE F. HAYES:

"I am a carpenter by profession and the first trouble I got into was a robbery of the Central Avenue Bank across from Armour packing house. We robbed the messenger as he was taking cash to another bank and used a car we had stolen the night before to carry us on this robbery. The next one was the Wilson Packing Company payroll robbery which Riley, Ward and I pulled off.

Masterson, Gladson and I pulled off the Turner Bank robbery where we held up their messenger on Kansas Avenue; that is all the jobs I was in except the box car robbery where David was killed."

Referring to the last mentioned robbery, during which David was killed, the transcript of said conversation (on pages 21 and 22 thereof) shows as follows:

"Q. Excepting this case. Now referring to the case on which you were convicted, who was with you on that case?" "A. Harry McCarthy and Bert Gladson and Nathan Loar."

"Q. Riley was not with you on that?" "A. No, sir."

"Q. Who framed this affair?" "A. Well, nobody framed this affair. At Bert's request we started out so he could get some money; he didn't have none, that is, I took Red Loar out."

"Q. At whose request?" "A. At Bert Gladson's."

"Q. At Bert Gladson's request you took Loar out. Where did you meet?" "A. Started to take him out here."

"Q. Didn't you know where you were going before you went?" "A. Well, I didn't know the roads very well; I was only up here one time."

"Q. Did you know what you were going after?" "A. No, sir, we didn't have anything in particular."

"Q. Sir?" "A. There was nothing in particular, just wanted to rob some box cars."

"Q. Where did you start from to this place where this man was killed?" "A. Started from Riley's house."

"Q. All right. How did you happen to be over at Riley's house?" "A. Oh, we all went down there and hang out down there."

"Q. When you went down to Riley's house did you know that you were going out on this work?" "A. Not until later on, until Bert told me that Red was broke and needed some money."

"Q. You went down to Riley's house the night before this man was killed here in this county?" "A. The same night."

"Q. The same night. And who was there at Riley's house?" "A. Harry McCarthy, Bert Gladson and I drove up there, and Harry McCarthy and Riley and Ward, and Thompson was all in there."

"Q. That is, Fred Thompson?" "A. Fred Thompson."

"Q. You have named all that were in the house?" "A. I think yes, that is all, besides his mother."

"Q. At the time you went over there you hadn't any idea about this particular deal?" "A. No, sir. I never had talked—"

"Q. Anyone come while you were there?" "A. I believe a fellow by the name of Phillips came while we were there."

"Q. What is Phillips' name?" "A. His name was, I don't know, he is a special agent for —Charles Phillips, special agent for the Santa Fe."

Mr. Seacat: We offer the plaintiff's Exhibit Three, which is the deposition of Mrs. Ada A. Riley, taken at 1016 South Coy Street in Wyandotte County, in the State of Kansas on the 17th day of

May, 1928, and I will now read the same to the jury. On page 4, that portion marked, is omitted.

Said plaintiff's Exhibit Three is in the words and figures as follows, to-wit:

MRS. ADA A. RILEY, of lawful age, produced, sworn and examined as a witness on behalf of the plaintiff, deposeth and saith:

Direct Examination.

Q. (by Mr. Seacat) Your name is— A. Ada A. Riley.

Q. You live at— A. 1016 South Coy Street.

Q. Mrs. Riley, do you know Bert Gladson? A. I certainly do, since he was a little boy.

Q. And Lawrence Hays? A. I am not very much aquainted; I knew him at that time I seen him many a time.

Q. Do you remember the occasion, Mrs. Riley, about five years ago, when a man named David was killed at Leavenworth? A. Yes, I remember about the killing. I don't know now when it was, but I remember about it.

Q. Do you recall, Mrs. Riley, seeing Bert Gladson and Lawrence Hays and Harry McCarthy the day before Mr. David was killed? A. Yes, they were all down here.

Q. What time did they come here? A. Well, I don't know what time but they were here off and on pretty near every day out there at that punching bag, and I remember seeing them come in the house, and McCarthy came in the house.

Q. Did you hear the conversation they had? A. No, not very much of it, I say he asked George and Freddy to go with him.

Q. Who was that asked Freddy to go with him? A. McCarthy.

Q. Bert was here at that time? A. I don't know whether he was in the house at that time; I don't think he was in the house at that time.

Q. Do you remember about what time of day that was? A. It was along in the evening, it wasn't dark, but it was sometime in the evening; along, I think, near supper time.

Q. Did they say where they were going? A. Well, now, they said something about where they were going. It was up here toward Leavenworth, I don't remember those places, because I am not acquainted. I heard George say, "I wouldn't go out there tonight for $50.00. You have made that place too much. It's hot. I wouldn't go out there for $50.00," so George didn't go and Freddy wouldn't go. He said, "Fred, let me have your gun." And he said, "No."

Q. Who said that? A. McCarthy. He said, "All right," and slammed the door after him.

Q. He and Bert and Lawrence left together? A. I don't know whether they did or not. They all went out there on the back; I suppose they did, I don't know; as far as I know they did.

Q. Have you seen McCarthy since that date? A. Not as I remember; I don't think I have.

Q. How long was it after that time, if you know, that Bert and Hays were picked up? A. Well, it wasn't but a day or two. I don't know when—Hays was picked up in a night or two. Mr. Hays called me up and said, "They have got Lawrence." Lawrence was picked up here at some store or pool hall, he said, "They have got Lawrence

and you tell George to try to get hold of Thompson to see if he can't get Lawrence out." That is the first I knew, I don't know when they got Bert.

Q. During that conversation, did they—did you hear McCarthy say to George, or George to McCarthy, what they were going to do that night? A. No, I never heard them say. Of course, George talked to me afterwards about it; said they were going out on the "Mop," the Missouri Pacific, they always said the "Mop."

Q. Did you hear McCarthy mention the "Mop"? A. He just asked the boys to go and George said he wouldn't go out there, of course George knowed what he meant. He said he wouldn't go out there.

Q. And that is about all you know about it? A. That is all I know about it.

Mr. Seacat: That's all.

Mr. Hackney: That's all.

(Witness excused.)

SOPHIA DAVID, being called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows, to-wit:

Direct Examination by Mr. Freet.

Q. State your name? A. Mrs. Sophia David.

Q. What is your age? A. Forty-two.

Q. What was your age on May 17th, 1923? A. Thirty-seven.

Q. You were the wife of James Lee David? A. Yes, sir.

Q. How long had you been married to him at the time of his death? A. About twenty-two years.

Q. How long had you lived in Kansas City, Missouri? A. At that time about twelve years —or ten years.

Q. Mr. David was shot and killed on May 17th, 1923? A. Yes, sir.

Q. Mrs. David, are you administratrix of the estate of James Lee David, deceased? A. Yes, sir.

Mr. Freet: I offer in evidence a certified copy—

The Court: (interrupting) I think it was admitted to start with.

Mr. Hackney: Yes. There is no use of putting that in or encumbering the record; it is conceded she is the administratrix.

Q. You are the administratrix of the estate and have been ever since shortly after he was killed under appointment by the Probate Court of Jackson County, Missouri? A. Yes, sir.

Q. How long had you lived in Kansas City prior to Mr. David's death? A. Ten years.

Q. Where did you live prior to that time? A. In Kentucky.

Q. In Kentucky, was Mr. David ever engaged in police work? A. No not in police work.

Q. He was employed in what capacity in Kentucky? A. Well, at different kinds of work; for different coal companies; he was weighman and at one time—he was usually weighing coal and in the store and doing then different kinds of work of that kind.

Q. About when did he go to work for the Missouri Pacific, with reference to the time of his

death? A. Sometime about the first of April, I think.

Q. As a train rider? A. Yes, sir.

Q. What was his salary at that time? A. $135.00 and expenses.

Q. One hundred and thirty-five dollars a month and expenses? A. Yes, sir.

Q. Now, how did Mr. David provide for you with respect to his salary? A. Well, he always provided everything for the home; I had no responsibility whatever.

Q. He used his entire salary for that purpose? A. Yes, sir.

Q. You had two children under age at the time of his death, were they not? A. No; they were not under age at the time; one was eighteen and the other was nineteen.

Q. One was eighteen and one was nineteen? A. Yes, sir.

Q. Were they living with you at the time? A. No; not right at the time. One of them had been.

Q. They were married? A. Yes; they were married.

Q. Now, since Mr. David's death, have you been employed? A. Yes, sir.

Q. Are you now employed? A. Yes, sir.

Mr. Hackney: We object to that as immaterial.

The Court: Objection overruled.

Mr. Hackney: To which we except.

Q. Where are you employed now? A. At the Kansas City Garment Company.

Q. What doing? A. I operate a power machine.

Q. You have never remarried? A. No, sir.

Q. You are still a widow of James Lee David? A. Yes, sir.

Cross Examination by Mr. Hackney.

Q. Mrs. David, do you know a—a Mr. Moore, the gentleman sitting back here (indicating)? A. Yes, sir.

Q. You knew him in Kentucky? A. Yes, sir.

Q. Was your husband in the employ of the Kentucky Coal Company as a guard about the time of the coal strike? A. Well, I don't know whether you could call it a guard or not; they had a valuable field there and they had Mr. Moore to look after the place for Mr. Moore and two or three others to stay at the place and they had powerful machine gun, with a headlight on the top of the building and his duty was to stay there and oversee that.

Q. Don't you know Mr. Moore was in charge of the men and that your husband was under Mr. Moore or in Mr. Moore's employ too? A. I don't know that he was in his employ—

Q. (interrupting) Well, he was working there at the time Mr. Moore was working there? A. Yes, sir.

Q. And he was armed a part of the time, wasn't he? A. No, sir.

Q. You say that he wasn't? A. No, sir, because he never had to leave the house and no one had to be armed in that house with a machine gun on the top of it and a search light.

Q. Who operated the machine gun? A. I don't know; different ones.

Q. Did your husband? A. No, sir.

Q. What was your husband to do there during that strike? A. Practically nothing.

Q. Was he employed for any purpose? A. Just to look after the house.

Q. Did he draw any wages?

Mr. Freet: Go ahead and finish.

A. He looked after the house and remained mostly in the dining room all night and whoever came in, he received them there. Mr. Moore wasn't there but very little of the time—he was in service most every place.

Q. Was your husband drawing a salary for his work? A. Yes, he had just been situated at the mines. We had been shut down and condemned and was looking after the machinery.

Q. Now, do you know of his working for the Pinkerton Detective Agency in 1911 to 1915? A. Yes, sir.

Q. Where did he do that work? A. In Kansas City.

Q. What was the nature of his work? A. He walked a beat for them.

Q. Walked a beat? A. Yes, sir.

Q. A guard sort of, here? A. Yes, sir.

Q. He was armed, then, wasn't he? A. Yes; he was armed then.

Q. Do you know when he was employed by the Missouri Pacific—do you remember the circumstances? A. Well, I don't remember of any particular circumstances of it.

Q. Your husband had an automatic revolver, didn't he when he worked for the Missouri Pacific? A. He had one belonging to the company.

Q. Well, an automatic revolver? A. I don't know nothing about it; I don't know.

Q. You know a sawed-off shotgun when you see it, don't you? A. Yes, sir.

Q. He had a sawed-off shotgun and revolver? A. He had a gun; he said it belonged to Mr. Boult.

Q. Well, what he said wouldn't be competent. A. He told me it belonged to Mr. Boult, and whether he had this revolver—the next day or so he brought this gun, I don't know.

Q. Anyhow, he kept those weapons with him during all the time he was working for the Missouri Pacific? A. Yes, sir.

Q. And you knew he kept them loaded, did you not? A. No; I do not know anything about that. I never thought of any such a thing.

(Witness excused.)

Mr. Freet: Mr. Hackney is admitting that Bert Gladsen is the same person as Albert Charles Gladsen who was tried in the District Court of Leavenworth County, Kansas, upon the charge of the murder of James Lee David on May 17th, 1923, and on that charge had a trial before a jury and was convicted of the crime of murder of said James Lee David and sentenced to life imprisonment in the Kansas State Penitentiary. Is that admitted?

Mr. Hackney: Yes.

Mr. Freet: That is our case. We rest.

Thereupon Mr. Hackney, counsel for the defendant, offered a demurrer to the plaintiff's evi-

dence in the nature of a peremptory instruction which is in words and figures following, to-wit:

The court instructs the jury, at the close of plaintiff's case, that under the pleadings and the evidence the plaintiff cannot recover and your verdict must be for the defendant.

(Refused.)

The Court: The requested instruction to find for the defendant is refused: it is in the nature of a demurrer to the evidence.

Mr. Hackney: To which we except.

Thereupon the defendant introduced its evidence in the following order, to-wit:

L. Q. MOORE, being called and sworn as a witness on the behalf of the defendant, testified as follows:

Direct Examination by Mr. Hackney.

Q. State your name? A. L. Q. Moore.

Q. Where do you live? A. In Kansas City, Missouri.

Q. What business are you in? A. I am special officer for the Missouri Pacific Railroad Company.

Q. How long have you been engaged in that or similar business with the Missouri Pacific, Mr. Moore? A. Eight years.

Q. Did you know James Lee David in his lifetime? A. Yes, sir.

Q. When did you first get acquainted with him? A. I got acquainted with him in about 1906 or '07.

Q. When did you get acquainted with him and where? A. Where?

Q. Yes? A. In Webster County, Kentucky.

Q. Did you have anything to do with employing him during that time in any capacity? A. Yes; on one occasion he worked for me a few months.

Q. When was that, according to your best recollection? A. It was either 1907 or 1908.

Q. Were you working for a coal company at that time? A. Yes, sir.

Q. Was the company having a coal strike? A. Yes, sir.

Mr. Freet: Object to that as incompetent, irrelevant and immaterial, a matter taking place in 1907.

The Court: Overruled. It goes to the experience of the deceased.

Q. (Mr. Hackney continuing examination) In what capacity were you employed by the coal company? A. I was special agent for the coal company.

Q. Was the company having serious trouble in protecting its property? A. Yes; they had quite a bit of trouble.

Q. In what capacity did you employ Mr. David? A. Well, he was on our payroll as a guard but he was stationed around a building—we used to call it "the Widow Croft Mansion" and Mr. David and his family were living there and they prepared meals for some of our guards and some of the soldiers there at that time.

Q. Do you know whether David carried a revolver during that time he was guard there? A. Yes, sir.

Q. Did you have occasion to see him use a revolver? A. Yes, sir.

Q. What was that occasion, Mr. Moore? A. Well, on one occasion he kept a fellow by the name of Henry Wellington from shooting me.

Q. He didn't shoot anybody? A. No, he prevented this fellow from—

Q. (interrupting) Now, when did you see David after that experience in Kentucky? When did you next see him? A. I saw him on the 18th of December, 1922.

Q. And what was the occasion of your meeting him, do you recall? A. I was going to work here down on Broadway and I met him down there and recognized him and he did me.

Q. Did you have any talk with David after that time about being employed by the Missouri Pacific? A. Yes, sir.

Q. Just state the conversation, Mr. Moore? A. Well, I asked him what he was doing, that day I met him, and he told me that he had been employed here and I told him if I had known he was here he probably would have been working with us. I didn't have long to talk to him then, and later on, probably three weeks or a month, I saw him again.

Q. Had you had an experience and had to go to the hospital in the meantime? A. Yes; I got shot that same night that I met him that afternoon.

Q. In what way? A. I was out in the railroad yards and I got shot in the lung.

Q. And did David call upon you at the hospital? A. No; he didn't but he came to my

room after I was able to go home in seventeen days.

Q. State the conversation you had with him about employing him—what he asked and what you told him? A. Well, I met him downtown several times, three or four times, and one afternoon I met him down town and he had a Ford car and we drove down and saw Mr. Barber, special agent for the Missouri Pacific, and he wasn't in—he was out of the office and we didn't see him on that occasion; and Mr. Barber and I drove out to his house the next day.

Q. Did David suggest to you he was looking for employment or would like to be employed by the Missouri Pacific Railroad Company? A. Yes, sir.

Q. In what capacity? A. As special officer, train rider, if a job was open.

Q. You saw him and you say arranged for him to meet Mr. Barber? A. Yes; we arranged it and I went down and he wasn't in that day and Mr. Barber and I drove out to David's house.

Q. Now, what conversation did you and Mr. Barber have with David out there at that time? A. Mr. Barber sat in the car—I went and found where he lived and went up and got him and met his wife and he came down, David and myself, and went over to the car and I introduced him to Mr. Barber and asked him if he was looking for employment and he said he was; he said he had a position open—

Q. (interrupting) State who that was said by? A. Mr. Barber asked him if he was look-

ing for a job or position and he said he was and Barber told him he had a position open as a train rider, and he told him, too, he didn't have long to talk. Then he had to go some place else and he told him he was having a good deal of trouble and he would have a good deal of trouble and asked him if he would fight those fellows and he said he would "until he died."

Q. What was said about there being frequent train robberies? A. I can't say just now.

Q. Well, you said something about fighting those fellows. Give Barber's language as well as you can? A. Well, he told him he had a lot of thievery on the road and robbers. He told him he had a position open as a train rider and he told him, too, he didn't have long to talk.

Q. (interrupting) Use Barber's language? A. Mr. Barber said, "We are having some trouble with a lot of train robbers" and he said, "there is a position open" and he says, "I want to know whether you will fight those fellows or not?"

Q. What did David say? A. He said, "I will fight them until I die." And he said "Come down and see me tomorrow" and we drove off.

Q. Did you then assist in making detailed arrangements with David about starting to work later on? A. Yes, sir.

Q. What was done about arming him? A. Well, Mr. Boult, the assistant chief special agent, had a forty-five automatic Colt, but there was something wrong with it and he loaned him the gun and I took the gun down to the gunsmith and had it repaired; it cost two dollars and a half.

Q. Was that weapon provided David? A. Yes, sir,

Q. Was he provided with any other weapon? A. Yes, sir; a number twelve shotgun with number one buckshot.

Q. What instructions were given David, if anything, about protecting himself and looking out for his safety?

Mr. Freet: We object to that unless it is shown to have been given in his presence.

Q. Well, was any instruction given in your presence? A. Well, I assigned David and Mr. Boyd in riding our trains between Kansas City and Leavenworth.

Q. What instructions were given him? A. I told him to be careful and to look out for those fellows and I gave him all the pointers that I could.

Q. State what you said about the danger, if anything, about dealing with those men? A. I told him they would shoot him just as quick as they saw him and to be awful careful and "watch your step" is about what I said to him.

Q. At, and previous to the robbery out there at Osawatomie in which Thompson had been shot, was that before that time or afterwards? A. That was before that.

Q. Did you explain anything to him about that? A. I don't know as that was mentioned.

Q. You provided this shotgun and revolver and turned them over to him for use? A. Yes, sir.

Q. Was it a Winchester Pump Gun or automatic? A. A Winchester Pump Gun.

Q. How much of the barrel was sawed off? A. I think it was a twenty-four inch barrel.

Q. It was cut down to that? A. Yes, sir.

Q. What, if anything, was fixed on there for him to carry the gun with? A. They had a leather strap to the gun—some did and some didn't. I think he had a little leather strap on his to throw over his shoulder so he could swing with his hands on the door of the train.

Q. How long did you remain after that, approximately in the service here in Kansas City? A. I left here—about three years—about three years on work.

Q. During that time you were working here, before you were taken to another station, did you see David at work? A. I saw him every morning when he came in.

Q. Did he have a sawed-off shotgun and revolver? A. At all times.

Q. At all times? A. Yes, sir.

Q. What did he say about them being loaded, if anything? A. Well, I think he told me—I had him try this gun out, the one we had worked over at the shop, and he said it worked all right. That was all that he said about the gun.

Q. What other train rider was used in connection with David? A. Harve Boyd.

Q. Do you know where he is? A. No, sir.

Q. Is he the same Boyd who was on the train the night David was killed? A. The same Boyd, I presume.

Q. Did Boyd go armed also? A. Yes, sir.

Q. Where were you transferred? A. Pueblo, Colorado.

Q. You left a few days after David's employment? A. Yes, sir.

Q. Did you see David after you left here before his death? A. No, sir.

Mr. Hackney: You may inquire.

Cross Examination by Mr. Freet.

Q. How long had you known Mr. David, Mr. Moore? A. Since 1906; shortly after I went to work for the Westchester Coal Company. He was weighing coal at that time.

Q. You saw him here in Kansas City all of the time he lived? A. Yes, sir.

Q. What time did you leave? A. I saw him on the 18th of December and I left this city on the 8th of April.

Q. And you had seen him in between times? A. Yes, sir.

Q. What was Mr. David's apparent health during all of that time? A. It was good.

Q. He was apparently an able bodied and well man, was he? A. Yes, sir.

Q. Are you still in the employ of the Missouri Pacific? A. Yes, sir.

Q. What is your position? A. I am special officer.

Q. Is that the same position you had at the time you introduced Mr. David to Mr. Barber? A. No, sir; I was night sergeant at that time.

Q. But you are in the same department? A. Yes, sir.

Q. How long have you been with the Missouri Pacific? A. Eight years and—eight years the 28th of this month.

Q. In the same department? A. Yes, sir.

Q. Now, Mr. Moore, have you also served as train rider? A. Yes, sir; I have ridden a few trains—not very much.

Q. As a matter of fact, there are frequently tramps found riding trains, aren't there? A. Yes, sir.

Q. Men who are just bumming rides from different points to different points, aren't there? A. Yes; that is true.

Q. And men who are not attempting to resort to robbery or crime of any kind—just trying to get a lift from one town to another? That is true, isn't it? A. Well, you can't tell what a fellow is doing when he is riding a train.

Q. Well, that is true, isn't it, that tramps and men are trying to get a lift from town to town and are found on trains from time to time? A. Yes, sir.

Thereupon the defendant produced as its next witness,

H. M. DOUGHERTY, who, after being first duly sworn, testified as follows:

Direct Examination by Mr. Hackney.

Q. You may state your name to the court and jury. A. H. M. Dougherty.

Q. What is your business? A. Train service; conductor in the employ of the Missouri Pacific.

Q. You were a conductor in the employ of the Missouri Pacific? A. I am now; yes, sir.

Q. Were you in May, 1923? A. I was a brakeman at that time.

Q. Where were you running at that time? A. From Kansas City to St. Joe.

Q. What train did you have? A. Train 173.

Q. Is that a freight train? A. Yes, sir.

Q. Were you on the train—did you know James Lee David, a train rider? A. Yes, sir.

Q. How long had you known him prior to his death? A. I had known him for some considerable time.

Q. You had known him for about how long? A. Well, I can't recall just how long I had known him.

Q. But you had known him for some considerable time? A. Yes, sir.

Q. Had he been riding that train you had been operating on previous to the night of his death? A. Yes, sir.

Q. How frequently did you see him in the month of May, 1923, riding that train? A. Probably every night he was riding it.

Q. Do you remember the circumstances of David's killing? A. Yes, sir.

Q. You were on that train, were you? A. Yes, sir.

Q. Was there any other train rider besides David? A. Yes, sir.

Q. And how many cars were in the train? A. Oh, probably fifty-five or sixty.

Q. And where was your station while the train was traveling? A. In the cab.

Q. Do you remember seeing David on the train that night previous to getting to Leavenworth? A. Yes, sir.

Q. Where was he when you first saw him? A. I think he boarded the train at A C Junction. That is over here at the state line where we pick up merchandise.

Q. State what gun he had, if any. A. He had a sawed-off shotgun and revolver.

Q. How far did he ride the caboose on that night? A. To Wolcott, Kansas.

Q. Then what became of him? A. I stopped at Wolcott and he went on up through the train and he stayed on the head end of the train from Wolcott.

Q. Had he been on the front end of the train or caboose? A. Up at Wolcott he got out of the caboose.

Q. Did you see him after that? A. Yes.

Q. David stayed on ahead after leaving Wolcott? A. Yes, sir.

Q. Is that the usual way for train riders to take their place in riding a train—for train riders to ride on the train? A. On our train one rode on one end and one on the other.

Q. Well, sometimes do they ride together? A. Well, sometimes they ride on the train and sometimes in the caboose.

Q. As you recall now, which was the next stop after Wolcott? A. South Leavenworth.

Q. Now, Mr. Dougherty, had you had any information about the robbery of that same train about two weeks previous to this night? A. No; I wasn't on it then.

Q. Did you hear about it? A. Yes, I heard about it.

Q. Going now, to the matter of the—after you left Wolcott you say Boyd was on the rear end of the caboose and David was up in front? A. Yes, sir.

Q. What did you do when you got to South Leavenworth? A. We took the passenger heading for the main line.

Q. Was that a meeting place that night? A. Yes, sir.

Q. Did you hear any shooting that night? Yes, sir.

Q. How long had you been on the passing track before the shooting occurred? A. Oh, probably ten minutes.

Q. When the shooting began, where were you? A. I was walking between the passenger track and the main line.

Q. And where was Boyd? A. Boyd was right behind me.

Q. Did you leave the caboose some distance behind at that time? A. Well, we probably left the caboose together.

Q. I mean how far were you from the caboose? A. Oh, about fifty cars, probably.

Q. You say back up the track about fifty cars? A. Yes, sir.

Q. How near were you to any of the places where the shooting occurred when the shooting occurred? A. Probably four or five car lengths.

Q. Did Boyd shoot any? A. Yes, sir.

Q. How many times? A. I can't recall that.

Q. Could you see anybody running away or was it too dark? A. No, sir; I could not see the seal.

Q. Did you go up to where David was then? A. Yes, sir.

Q. About how far from the engine was he back, was he, Mr. Dougherty? A. Oh, probably twenty-five cars; twenty to twenty-five. Somewhere along in there.

Q. What did you observe about David's condition? A. He was lying on the ground.

Q. Was he dead? A. Yes, sir.

Q. Did he have this sawed-off shotgun with him? A. Yes, sir.

Q. And his revolver? A. Yes, sir.

Q. Did you know whether David generally carried a flash light? A. Well, I wouldn't say whether he had one that night or not but they generally carry them.

Q. Do they have to use a flash light in examining the seals? A. Yes, sir.

Q. What do train riders do when the train stops? What work do they do? A. They would go over and examine the cars and seals.

Q. You didn't see anybody do the shooting at all? A. No, sir.

Q. Didn't see David when he was shot? A. No, sir.

Q. He was lying there dead, but you saw him? A. Yes, sir.

Q. And you were about 4 or 5 car lengths this side of where he was killed, were you? A. Yes, sir.

Q. Did you notice about the direction the shot struck him? A. Well, it appeared he was shot from someone standing up and ranged downward.

Q. I believe you said he was dead? A. Yes, sir.

Q. Was he shot in the heart? A. I don't know exactly in the heart; probably down in the chest somewhere.

Q. Well, you went to him just as soon as the shooting was over? You went right to where he was? A. Yes, sir.

Q. And he had no life in him at that time? A. No, sir.

Cross Examination by Mr. Freet.

Q. What first attacted your attention to the fact that anything unusual had taken place? A. Shots.

Q. You had neither seen nor heard anything up to that time? A. No, sir.

Q. Could you tell where the shots came from? A. No; I could not tell that.

Q. See the flash? A. No, sir.

Q. Was David lying on the same side of the train you were on? A. Yes, sir.

Q. When you found him? A. Yes, sir.

Q. And you hadn't seen any flash of the gun? A. No, sir.

Q. You just heard the reports? A. Yes, sir.

Q. And you went up to him? A. Yes, sir.

Q. And examined him? A. Well, I just looked at him there and to see whether he was dead.

Q. You saw where the bullet pierced his body? A. Yes, sir; I saw where the blood was pouring out.

Q. Had you had any information or warning of any kind that there was liable to be a robbery of the train that night? A. No, sir.

Re-Direct Examination by Mr. Hackney.

Q. How many shots did you hear? A. I heard two shots, and then there was some gentleman—

Q. Did Boyd shoot? A. He shot.

Q. He shot? A. Yes, sir.

Q. How many bullet holes were there in David? A. I didn't examine as to that.

Q. Were the two shots pretty close together? A. Yes, sir.

(Witness excused.)

C. M. BARBER, being called and sworn as a witness on behalf of the defendant, testified as follows, to-wit:

Direct Examination by Mr. Hackney.

Q. Mr. Barber, what is your name? A. C. M. Barber.

Q. What is your age? A. 58.

Q. What is your present occupation? A. Assistant chief special agent for the Missouri Pacific Railroad.

Q. That is, you are now occupying the position previously occupied by Mr. Boullt before his death? A. Yes, sir.

Q. Prior to Mr. Boullt's death and while you were at Kansas City, what position did you occupy? A. The position of special agent.

Q. State what your general duties were, Mr. Barber? A. The general duties were to employ proper men to guard for the company's property in the capacity of special officers.

Q. And you were at Kansas City how many years before David was employed? A. Well, I came there in October first, first in 1921.

Q. A mention is made in the deposition about your being transferred to St. Louis after the spring of 1923? When were you transferred to St. Louis? A. I was transferred to St. Louis March 1st, 1924.

Q. That is about ten months after Mr. David was killed? A. Yes, sir.

Q. Do you remember the circumstances of the employing of Mr. David? A. Fairly well.

Q. And what was it that first brought your attention to the fact that David desired a position with the company—who was it that first brought that to your attention? A. Mr. L. Q. Moore.

Q. The gentleman that just testified here this morning? A. Yes, sir.

Q. Mr. Moore was then in the service of the company? A. He was at that time acting as night sergeant for me.

Q. Now, do you recall the day you first had a talk with Mr. David about employing him as train rider and special officer? A. I don't remember the exact date; I remember the circumstances.

Q. State what conversation you had with David about what the dangers and his duties would be in that position? A. Mr. Moore brought David to the car where I was waiting and asked Mr. David if he was looking for a position as

special officer and he said he was looking for work. I told him the nature of the work that I wanted done.

Q. What did you tell him about the nature of it? A. I told him that we were having a great deal of trouble with a bad gang of train robbers robbing our trains en route and that I was looking for a man of sufficient ability to cope with them—a man who was not afraid to cope with them and a man who would shoot and use good judgment and watch things and if necessary to possibly catch them and after I had gone over the matter thoroughly with him he said "I will take the job" or words to that effect. I don't remember the exact words but the import of the conversation was as I have stated.

Q. Well, what explanation did you make about previous robberies or attempts to rob the train before that employment? Did you explain to him about those bandits robbing? A. I explained to him that they had been robbing the cars en route—throwing the stuff out en route and they were a large gang and a bad gang.

Q. Did you tell him that they were armed? A. Yes, sir; I did.

Mr. Frett: We object to that as leading.

The Court: Avoid leading questions.

A. I told him that all of them were armed and that all of them would shoot him on sight and that he had to be very careful.

Q. To be careful about what? A. About his own life.

Q. How long did you talk with David about employment? A. Well, at that time, probably ten minutes.

Q. Did he then come down to your office where you employed him. A. Yes, sir; a week later.

Q. You made out or assisted in making out the application for his employment? A. Yes, sir.

Q. And did he explain to you about previous police work he had had at various times? A. Well, as I recall it, he said he had some experience as a guard somewhere but I don't remember at that time where he said it was but it was in Kentucky somewhere and I believe he said he had experience as a marshal or watchman or something like that in Kansas City.

Q. Now, Mr. Barber, do you know about David's being given any firearms, if so, state what they were? A. Well, David was carrying a pistol and a sawed-off shotgun. They were given to him for the purpose of defending himself and the company's property.

Q. Was he given any instructions about carrying that regularly? A. Well, there was a general instruction out to all our men to carry their arms anywhere they go, anywhere they could get hold of them because they would—because they were told they would be liable to need them at any time.

Q. Was David told that? A. I don't remember whether David was specifically told that by himself but he was told and furnished the guns by Mr. Moore, my night sergeant.

Q. Now, then, previous to the time of David's fatal shooting, had you, about two weeks before, had you had a robbery up at Wolcott? A. Yes, sir.

Q. Was that on the train that David was riding? A. Yes, sir.

Q. Well, was David advised as to what occurred up there that night? A. Yes, sir; with others.

Mr. Freet: By you and Mr. Barber?

The Witness: I think by Mr. Moore, if I remember correctly. I called him in the office, come to think of it.

Q. Did you have a report in your office on the operators of the train? Do you know where David was that night and why he wasn't on the train? A. I think that is so; it was discussed.

The Court: If it was discussed you may state it. Did you get a report of why David wasn't on the train? A. Yes, sir.

The Court: What was that?

A. He had got left here at A C Junction that night by reason of having seen some robbers or thieves operating on some of the cars beside the tracks, and he got out to catch the thieves and the train pulled out and left him.

Q. That was about two weeks before his injuries? A. That was about fifteen days, I think.

Q. What, if any advice did you have from David on the subject or what investigation did he make on the subject? A. David had no investigation because he wasn't on the train and that was his explanation of why he wasn't on the train that he had gotten left.

Q. Do you know what part of the train the robber was on when this Wolcott robbery occurred that night? A. I don't know; I am not sure.

Q. Now, did Boyd usually ride the train with David? A. He was riding at that time, I believe.

Q. How was Boyd armed, if you know? A. Boyd went armed with a pistol but I am not sure whether Boyd carried a shotgun or not.

Q. He was on that train assisting David in protecting that train that night? A. Yes, sir.

Q. Did your train riders carry flashlights also in addition to the weapons? A. I think all of them did; they are all supposed to carry them.

Q. What would be the occasion of using a flashlight? A. Well, the use of a flashlight in that business is very little but occasionally it is very necessary. It is not necessary to examine the seals. They generally use them in order to protect their persons from hiding bandits along between the cars, but there are cases where you might find a door open and want to flash the light inside of a dark car to see what was the condition in it.

Q. Now, did you see David go out the evening before he was killed? A. I don't remember that.

Q. Well, had there been any other attempts to rob the train other than this Wolcott robbery about that time? A. Many; many.

Q. Did you tell him to carry this information to the train riders? A. Well, after every robbery I made it a point to talk to all our men engaged in that kind of business. What particular men I talked to, I don't know; but I made it a point to inform all of them of the facts so they could use the facts in protecting themselves and to better apprehend the thieves.

Mr. Freet: We object to that as argumentative and a conclusion and not shown that it was brought to the attention of Mr. David.

The Court: Objection sustained.

Mr. Hackney: To which we except.

Q. Mr. Barber, at the time of this killing of David, had any of those Kansas City, Kansas thieves been apprehended in any of their robberies that you know of? A. The two of them had been apprehended at Osawatomie, Kansas.

Q. Who were they? A. "Red" Lohr and Bert Gladsen.

Q. Was that the night that Dr. Thompson was shot? A. Yes, sir.

Q. Had Gladson been tried on the charge at Paola previous to this robbery at Leavenworth? A. Both of them had been tried and were out on the bond when the killing of Mr. David occurred.

Q. State, if you know, after you communicated—state whether or not you advised David of their conviction for those offenses? A. I don't remember. In all probability he was advised, but I don't know.

Mr. Freet: We object and ask that that be stricken out.

The Court: Sustained. Stricken out.

Q. Now, do you know Harold McCarty? A. Yes, sir.

Q. Did you know of his employment as informant by Mr. Mitchell and Mr. Boullt? A. I had heard of it.

Q. State whether or not anyone but yourself and Mr. Boullt and Mr. Mitchell knew about that employment?

Mr. Freet: Object to that as calling for a conclusion of the witness.

The Court: Sustained.

Q. State whether or not you advised the other special agents and train riders of the employment of Harry McCarty? A. I didn't.

Mr. Freet: We object to that unless it is shown it came to the knowledge of the deceased.

The Court: He said he didn't.

Q. You didn't advise anybody of the employment of Harry McCarty? A. No, sir.

Q. State the reason of that? Was it kept a secret or not? A. It wasn't calculated, on such cases—it wasn't calculated to come to the knowledge of anyone employed.

Q. Outside of the head men? A. Outside of the heads who employed them.

Q. Now, Mr. Barber, had you any knowledge of the purpose of Gladson and others of attempting to rob this train before David was killed? A. No, sir.

Q. When did you learn of the killing? A. I think it was early on the morning of the 17th.

Q. You had no previous knowledge of the matter? A. No, sir.

Q. Or of the intended robbery? A. No, sir.

Cross Examination by Mr. Freet.

Q. You say you talked with Mr. David probably about ten minutes before you employed him? A. Something like that.

Q. And Mr. David apparently was in good health? A. Yes, sir.

Q. And remained so as long as he was in the employ of the company? A. Well, Mr. David was a rather slight man and his appearance led

me, like some people, to believe that he wasn't in perfect health, but I didn't find any trouble with him.

Q. He attended to his duties regularly? A. Yes, sir.

Q. So far as you could tell he was always in good health? A. Yes, sir.

Q. How long had you known McCarty before David was killed? A. I never had known him at all.

Q. You had never come in contact with him in anyway? A. No, sir.

Q. Did you know of his employment? A. Not at the time.

Q. You didn't know anything about the facts that McCarthy had been employed prior to David's death? A. Oh, yes; I knew he had been employed prior to David's death but I didn't have anything to do with it and I wasn't in on the matter at all.

Q. How did you learn of his employment? A. I think from Mr. Boullt or Mitchell, I forgot which.

Q. And that was before Mr. David's death? A. I don't remember but I rather believe it was just about the time Mr. David was hired, if I remember right.

Q. But you had nothing to do with that? A. No, sir.

Q. Had you ever employed any thieves or robbers to act as snitches?

Mr. Hackney: We object to that as immaterial.

The Court: Objection sustained.

Q. Did you know of any other thieves or robbers that were employed as snitches at the time of Mr. David's death? A. Well, there is generally a great many of those character of people employed by different railroads, as you don't employ a preacher to catch a thief.

Q. Were they employed by the Missouri Pacific? A. No; not that I know of.

Q. Did you know of any other thieves and robbers being employed by the Missouri Pacific at that time? A. No, sir.

Mr. Hackney: Object—he has already answered the question.

The Court: He has answered it and he said "no."

Re-Direct Examination by Mr. Hackney.

Q. Mr. Barber, I overlooked asking you whether or not there was a report came to the Missouri Pacific or your department officers and yourself of an intended robbery out at Kenneth Junction some time previous to David's killing? A. Yes, sir.

Mr. Freet: We object to that as incompetent, irrelevant and immaterial.

The Court: He has answered it. Proceed.

(Witness excused.)

Mr. Hackney: We rest.

Mr. Freet: The plaintiff asks that the deposition of Patrick McCarty be marked Plaintiff's Exhibit Four, which I failed to have marked when I read it. That is all.

Mr. Hackney: We offer a demurrer to the plaintiff's evidence.

At the close of all of the evidence the defendant offered a demurrer which demurrer is in the words and figures as follows, to-wit:

The court instructs the jury, at the close of all the evidence, that under the pleadings and the evidence the plaintiff cannot recover and your verdict must be for the defendant.

(Refused.)

The Court: Under the rule of law that the employee assumes the ordinary risk of his employment, if the deceased, Mr. David, had been killed by train robbers just as an accident, no recovery could lie. The employment and undertaking of the deceased, David, was an unusually hazardous one and he assumed the usual hazards of that unusual hazardous position. His employment was a good deal like going to war and if he had been killed in the line of his employment, if he had met bandits and they had shot him—that is what he was employed to expect and face, and no recovery could be had because that was legitimate to employ people for that purpose. It is lawful to protect one's property, and it is lawful to resist force with force, then, protect law and property. So the employment by Mr. David was lawful; it was hazardous and he knew that and knowing it, understood it.

The question arises here, if they have an employee, if they have knowledge, whether it comes from the employee or from the outside, if they have knowledge of the unusual occurrence that is likely to arise, whether they haven't got to use all necessary means to notify the employee of that, to the end he might provide against it or

quit his employment or he might require additional protection.

It is an unusual case, and at first blush it would seem that the hazard was one of his employment and it would have been if the company had not received what amounted to a notice to them and notice to this convict or this stool pigeon, if they saw fit to employ so unworthy source of information, why are they not bound; or why is it not a question for the jury that they are bound by his lack of intelligence or lack of knowledge in not imparting the knowledge? It goes without saying if they retained the knowledge or this man knew—that is, had known and kept silent—the knowledge is imputable to them. It is a question of fact for the jury to pass upon. And you have very studiously and thoroughly gone into that, whether the information came to them at noon or at night; I think it is a question for the jury whether or not the defendant had knowledge within sufficient time, through McCarty, so he could have imparted to the defendant and they could have thereby warned the deceased and have taken steps to protect him. I am not clear about the matter but I think that this is a question for the jury.

Entertaining this view, the demurrer is overruled.

Mr. Hackney: To which we except.

The Court: Now, what about the instructions?

Mr. Hackney: The defendant objects to each and every instruction given by the court, either on the court's own motion or at the request of plaintiff on plaintiff's behalf. The defendant excepts

to the refusal of the court to give each instruction asked by the defendant and refused by the court. The defendant excepts to the modification of each of its instructions asked by the defendant and modified by the court and which were given by the court as modified.

Mr. Freet: The plaintiff objects to each and every instruction given by the court at the request and on behalf of the defendant and also objects to each and every instruction offered by the defendant and modified by the court and given to the jury as modified.

At the conclusion of all the evidence in the case the court instructed the jury as to the law in the case on behalf of and at the plaintiff's request, as follows:

1.

The court instructs the jury that it is admitted by both parties to this suit that James Lee David was in the employ of the defendant in interstate commerce as train rider on May 17, 1923. You are further instructed that if you find and believe from the evidence that on and prior to said May 17, 1923, one McCarthy was in the employ of the defendants as an informant, and if you further find that said McCarthy, on the 16th day of May, 1923, was informed and knew that certain persons planned and intended to rob a certain train of the defendant at Leavenworth, Kansas, in the early morning of May 17, 1923; and if you further find that said McCarthy knew that said persons intended to be armed with firearms at the time of such intended robbery, if you

so find; and if you further find that said persons, if you so find, did go to Leavenworth, Kansas, and did approach the train of defendant upon which said David was employed, for the purpose of robbing the same and that said David had no knowledge of said intended robbery, if you so find, and if you further find that said McCarthy knew of said intended robbery, if you so find, in time, by the exercise of ordinary care and with safety to himself to have warned said defendant and for defendant thereafter to have *warned* James Lee David of such intended robbery; and if you further find that said McCarthy negligently and carelessly failed to report said information if you so find to the defendant; and if you further find that as a result of such negligence and carelessness, if you so find, the said James Lee David was shot and killed in the early morning of May 17, 1923, by one of the persons known by said McCarthy to have been among said persons who intended said robbery, if you so find, and while attempting to carry out the plan and intent to rob said train, if you so find, and if you further find that the plaintiff, Sophia David, was the wife and is now the widow of said James Lee David, and administratrix of his estate, then your verdict will be for the plaintiff and against the defendant, and you will assess plaintiff's damages in such an amount as will fairly and reasonably compensate the said widow of said James Lee David for the loss of pecuniary benefits which she might with reasonable certainty have received if said James Lee David had not been killed; and in fixing the amount of such damages, if any the jury may

take into consideration James Lee David's age, his probable expectancy of life, health, physical condition, earning power, and also the age and probable expectancy of life of his said widow."

(Given.)

To the giving of the above instruction the defendant excepted at the time.

2.

"The court instructs the jury that by the term 'ordinary care' as used in these instructions is meant that degree of care which an ordinarily prudent person would have exercised under the same or similar circumstances. By the words 'negligence' and 'negligently' as used in these instructions is meant failure to use such ordinary care."

(Given.)

To the giving of the above instruction, defendant excepted at the time.

At defendant's request, the court gave the following two instructions, numbered 3 and 4:

3.

"There is no evidence of any understanding or agreement between Gladsen and McCarthy to the effect that David was to be shot and killed by Gladsen, nor is there any evidence that McCarthy, prior to the fatal shooting of said David had any knowledge of the purpose and intent on said Gladsen's part to shoot and kill said David."

4.

"Even though the jury may find from the evidence that the defendant's officers and agents

employed one McCarthy as an informer on car thieves and train robbers, and that prior to and at the time of such employment they knew that said McCarthy was a car thief, train robber, convict or ex-convict, yet such employment by them of McCarthy as such informer was not unlawful; and the defendant is not by reason of such employment liable for the act of McCarthy in accompanying Gladson and others in an attempt to rob the train on which David was train rider, nor for the act of said McCarthy in being present at the time and place of the fatal *shooting* by Gladson of said David."

The defendant asked the court to give the following instruction, to-wit:

F.

"The court instructs the jury that if you find from the evidence that the deceased, James Lee David, was employed by the defendant as a special agent and train rider, for the purpose of protecting defendant's trains from car thieves and train robbers, and that he was warned that train robberies were frequently being perpetrated, and that attempts to rob the cars of the defendant's trains were likely to occur at any time and place, and that said David was instructed to arm himself with firearms and be constantly on the lookout for such thieves and train robbers, and to look out for his own safety and to protect himself against such thieves and train robbers, and if you further find that said David agreed so to do; and if you further find that at the time of

his fatal injury said David was armed with and was then and there carrying on his person a loaded revolver and a loaded sawed-off shotgun so as to protect himself, then the said David voluntarily assumed the risk of injury from thieves and train robbers, and your verdict must be for the defendant."

The above instruction asked by the defendant was refused by the court, and thereupon the court modified said instruction by adding thereto the following paragraph, to-wit:

"Unless you find and believe from the evidence that McCarthy, the then employee of defendant, had knowledge of such intended train robbery a sufficient length of time before said attempt to have, with safety to himself, warned the defendant and the defendant thereupon to have warned David of said intended train robbery in time for said deceased, David, to have taken steps, if any, to further protect himself therefrom."

Thereupon the court gave said instruction, so modified as No. 5, to which action and decision of the court, in refusing to give said instruction as asked by the defendant, and in modifying and giving the same as modified, the defendant then and there excepted at the time.

The defendant then asked the court to give the following instruction:

G.

"The court instructs the jury that if you find from the evidence that the deceased David

was, prior to his fatal injury, warned by defendant's officers that as train rider he should at all times be on the lookout for thieves and train robbers, and that he should arm himself with a loaded revolver and loaded sawed-off shotgun, so as to cope with such thieves and train robbers, and that on the night of his fatal injury he was so armed, then the plaintiff cannot recover, and your verdict must be for the defendant."

Which instruction the court refused to give as asked, and thereupon the court modified said instruction by striking out in the last sentence thereof the words, "then the plaintiff cannot recover, and your verdict must be for the defendant," and by inserting in lieu thereof the words, "then the deceased assumed the ordinary dangers, risks and hazards of such employment," and gave said instruction so modified as Instruction No. 6, to which action and decision of the court in refusing to give the instruction as asked by the defendant, and in modifying same, and in giving same as modified defendant then and there excepted at the time.

The court then gave the following additional instructions:

7.

"There is no evidence as to how or why David was shot, nor what if anything he did to provoke such shooting.

8.

"You are instructed that nine or more jurors may render a verdict for either party in this

case. If all of you agree upon a verdict, your foreman alone will sign it, but if your verdict is rendered by nine, or more, and less than twelve jurors, your verdict must be signed by all of the jurors who agreed to it."

Forms of Verdict.

"If all of you agree upon a verdict for the plaintiff, it may be in the following form: 'We, the jury, find the issues for the plaintiff, and do assess her damages at ..... dollars. (Stating the amount).

..... Foreman.'

"If a less number than twelve jurors render a verdict for the plaintiff it may be in the following form: 'We, the undersigned jurors, find the issues for the plaintiff, and do assess her damages at ..... dollars' (stating the amount)."

"If all of you agree upon a verdict for the defendant, it may be in the following form: 'We, the jury, find the issues for the defendant.

..... Foreman.'"

"If a less number than twelve jurors render a verdict for the defendant, it may be in the following form: 'We, the undersigned jurors find the issues for the defendant.'"

"These forms are given for guidance only and your verdict should be written on a separate paper, and not on one of these instructions."

Thereupon the defendant prayed the court to give the following instructions, to-wit:

(C)

"The court instructs the jury that there is no evidence in this case from which the jury would be justified in finding that had there been additional armed train riders or officers on the train on which David was train rider on the night of his fatal injury, that the presence of such additional train riders or officers would have prevented the fatal shooting of said David."

(Refused.)

(D)

"The court instructs the jury that there is no evidence from which the jury can find that had James Lee David been warned that Gladson and others intended to attempt to rob the train on which he was acting as train rider, that he would have acted in anywise different from what he did act at the time of his fatal injury, nor that any such warning, if it had been given, would have prevented his fatal injury."

(Refused.)

(E)

"The court instructs the jury that there is no evidence of any negligence on the part of the defendant, in the performance of any duty it owed the deceased, James Lee David, and your verdict must be for the defendant."

(Refused.)

Which said instructions, so prayed by the defendant as aforesaid, the court refused to give to which action and ruling of the court in refus-

ing to give said instructions, the defendant then and there duly excepted at the time and still excepts.

Thereupon, at the conclusion of the arguments of counsel, the case was given to the jury, and in due time, and on the 19th day of June, 1928, the same being the 31st day of the regular May, 1928, term of said court, the jury returned a verdict in favor of plaintiff, upon which judgment was entered accordingly.

Said verdict is in the words and figures as follows, to-wit:

"We, the jury, find the issues for the plaintiff, and do assess her damages at fifteen thousand dollars ($15,000.00).

(Signed) Stanley S. Stone,
Foreman."

Endorsed on the back of said verdict is the number of the case, style, character of the document and the following:

Filed Jun 19 1928 Lynn G. Buford, Clerk By John Bolefahr, Deputy.

And afterwards, on the 20th day of June, 1928, the same being the 32nd day of the regular May, 1928, term of said court, at the same term and within four days after the rendition of the verdict the defendant filed herein a motion for a new trial which is in the words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City. Division No. 8. May Term, 1928. Sophia David, Administratrix of the estate of James Lee David, Deceased, Plaintiff, vs. Missouri Pacific Railroad Company, a corporation, Defendant, No. 209164.

Motion for New Trial.

Now comes the defendant and moves the court to set aside the verdict of the jury and to grant the defendant a new trial in the above entitled cause for the reasons following to-wit:

1. Because the court erred in admitting improper and illegal evidence on behalf of the plaintiff.

2. Because the court erred in excluding proper and legal evidence offered by the defendant.

3. Because the court erred in refusing the defendant's demurrer to the evidence and request for a directed verdict for the defendant offered at the conclusion of the plaintiff's evidence.

4. Because the court erred in refusing to give the defendant's demurrer to the evidence and request for a directed verdict for the defendant offered by the defendant at the conclusion of all the evidence.

5. Because the court erred in giving each of the instructions given by the court on behalf of the plaintiff.

6. Because the court erred in giving each of the instructions on behalf of the plaintiff as modified by the court.

7. Because the court erred in refusing each of the instructions asked by the defendant and refused by the court.

8. Because the court erred in modifying each of the instructions asked by the defendant which were modified by the court and in giving each of said instructions as so modified by the court and in refusing to give the said instructions in their original form as asked by the defendant and without modification.

9. Because the evidence is insufficient to support the verdict.

10. Because the verdict is against the evidence.

11. Because the verdict of the jury is based on conjecture, speculation and guess work and not on sufficient legitimate evidence to justify the said verdict.

12. Because the verdict of the jury is against the law.

13. Because the verdict of the jury is against the instructions of the court.

14. Because the verdict of the jury is against the weight of the evidence.

15. Because under the law and the evidence the verdict of the jury should have been for the defendant.

16. Because the verdict of the jury is excessive in amount.

17. Because the verdict of the jury is based on bias, passion, sympathy and prejudice of the

jury in favor of the plaintiff and against the defendant.

(Signed) HACKNEY & WELCH,
Attorneys for Defendant."

Endorsed on the back of said motion for new trial is the number of the cause, style, character of the document and the following:

Filed, Jun 20 1928 Lynn G. Buford Clerk by John Bolefahr Deputy.

And afterwards, on the 20th day of June, 1928, the same being the 32nd day of the regular May, 1928, term of said court at the same term, and within four days after the rendition of the verdict, the defendant filed herein a motion in arrest of judgment, in the words and figures as follows:

"*In the Circuit Court of Jackson County, Missouri, at Kansas City. Division No. 8. May Term,* 1928. *Sophia David, Administratrix of the Estate of James Lee David, deceased, Plaintiff, vs. Missouri Pacific Railroad Company, a corporation, Defendant. No.* 209164.

Motion in Arrest.

Now comes the defendant and moves the court to arrest the judgment in the above entitled cause for the reasons following to-wit:

1. Because the plaintiff's amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

2. Because the record is insufficient to support the judgment.

3. Because on the whole the judgment is erroneous and cannot stand.

(Signed) HACKNEY & WELCH,
Attorneys for Defendant."

Endorsed on the back of said motion in arrest of judgment is the number of the cause, style, character of the document and the following:

Filed Jun 20 1928 Lynn G. Buford, Clerk by John Bolefahr Deputy.

And afterwards, on the 30th day of June, 1928, the same being the 41st day of the May, 1928, term of said court, the said defendant's motion for a new trial was taken up and submitted to the court, and having been by the court seen and heard, and duly considered, was by the court overruled; and to which action and ruling of the court in overruling said motion, and in refusing to grant the defendant a new trial herein, the defendant then and there duly excepted at the time and still excepts.

And afterwards, on the 30th day of June, 1928, the same being the 41st day of the May, 1928, term of said court, the defendant's motion in arrest of judgment was taken up and submitted to the court, and having been by the court seen and heard, and duly considered, was by the court overruled; and to which action and ruling of the court in overruling said motion and in refusing to arrest the judgment herein the defendant then and there duly excepted at the time and still excepts.

And afterwards, on the 7th day of July, 1928, the same being the 46th day of the regular

May, 1928, term of said court, the defendant filed herein its application and affidavit for appeal in words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City. May Term, 1928. *Division No.* 8. *Sophia David, Administratrix of the Estate of James Lee David, deceased, Plaintiff, vs. Missouri Pacific Railroad Company, a corporation, Defendant. No.* 209164.

Affidavit for Appeal.

Thomas Hackney, being duly sworn, makes oath and says that he is attorney and agent for the defendant, and that the appeal prayed for in the above entitled action is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment and decision of the court.

(Signed) Thos. Hackney,

Subscribed and sworn to before me this 2nd day of July, 1928.

(Seal) (Signed) Pearl Cramer,
Notary Public.

My commission expires May 23rd, 1929."

Endorsed on the back of said affidavit for appeal is the number of the cause, style, character of the document and the following:

Filed Jul 7 1928 Lynn G. Buford, Clerk By John Bolefahr Deputy.

And afterwards, on the 7th day of July, 1928, the same being the 46th day of the regular May, 1928, term of said court, the defendant's application and affidavit for appeal was by the court sus-

tained, and appeal allowed, as prayed, to the Supreme Court of the State of Missouri, and the defendant thereupon granted leave to file its bill of exceptions in this cause until on or before the last day of the regular September, 1928, term of this court. Defendant's appeal bond is by the court fixed in the sum of thirty-one thousand ($31,000.00) dollars which is now filed herein and by the court approved.

Wherefore, defendant prays the court to settle and allow this its bill of exceptions to all and singular the acts, rulings and orders of the court in the premises, and that the same may be signed, filed and made a part of the record herein.

Now, therefore, the court, being fully advised in the premises, doth find the foregoing to be a correct bill of exceptions taken and saved on behalf of the defendant herein, and doth now sign the same, and doth order that the same may be filed and made a part of the record in this cause.

Given under the hand of the Judge of said court before whom said proceedings were had, on this 4th day of January, 1929.

RALPH S. LATSHAW,
Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 8.

We hereby consent that the foregoing is a full, true and correct Bill of Exceptions on behalf of the defendant herein, and agree that the same may be signed, filed and made a part of the record in this cause.

ROSENBERGER, MCVEY & FREET,
Attorneys for Plaintiff.

HACKNEY & WELCH,
Attorneys for Defendant.

[fol. 219]

IN THE SUPREME COURT OF MISSOURI.

[Title omitted]

SUBMISSION OF CAUSE—April 23, 1930.

Come now the parties by their respective attorneys and after arguments herein, submit this cause to the Court.

[fol. 219]

IN THE SUPREME COURT OF MISSOURI.

[Title omitted]

JUDGMENT—June 24, 1931.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in the form aforesaid, by the said Circuit Court of Jackson County, rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant her costs and charges herein expended and have therefor execution. [Opinion filed.]

[fol. 220]

IN THE SUPREME COURT OF MISSOURI,
DIVISION ONE.

[Title omitted]

OPINION.

This case comes to the writer on reassignment, having originally been assigned to one of our com-

missioners for the preparation of an opinion. It is an action under the Federal Employer's Liability Act to recover damages for the death of James Lee David, alleged to have been caused by the negligence of the defendant. David was in the employ of defendant as a train rider. Whilst engaged in the discharge of the duties incident to his employment, in the early morning of May 17, 1923, he was shot and killed by one Bert Gladsen, a train robber, who had gone to the place where the train under David's protection was standing for the purpose of breaking into and stealing from the box cars. The trial in the Circuit Court resulted in a verdict for plaintiff for $15,000. The cause comes to this Court on defendant's appeal.

> "It was admitted that David, when killed, was in the line of his duty, that his work was interstate commerce, and no question was raised as to the plaintiff being the administratrix of his estate. The sole question presented in the trial court and pressed here is whether or not any negligence of the defendant was shown and if so, whether it was the proximate cause of David's death" [Appellant's Brief].

The statement of the facts will be limited accordingly.

In April, 1923, the appellant was being "harassed, annoyed and robbed" by an organized gang of thieves, in and adjacent to Kansas City; it was being "robbed" every week around Kansas City; robberies had occurred at Leavenworth, Atchison, Stillwell, Osawatomie and Paola, in Kansas, and at Pleasant Hill, and Raytown, in Missouri. The thieves,

who were reported to be "bad men" who would shoot their way out of trouble when confronted with it, specialized in looting box cars carrying certain kinds of merchandise. Their depredations were not confined to any particular trains or runs, nor would they occur every night; they happened sporadically, yet frequently, at some point in the territory just referred to.

David was employed as a train rider on or about April 1, 1923. As such he was under the immediate supervision of appellant's divisional special agent at Kansas City by whom he was assigned to trains as and where needed. It was his duty to examine the seals of the car doors and see that they were intact and that the train was all right, both before departure and en route. In a general way he was to protect the train. There was no fixed rule about where he should ride on a train. He could ride in the caboose, in the engine cab or in a box car, as his judgment might dictate. With respect to the information and instructions given him at the time of his employment appellant's then special agent, C. M Barber, testified:

> "I told him that we were having a great deal of trouble with a bad gang of train robbers robbing our trains en route and that I was looking for a man of sufficient ability to cope with them—a man who was not afraid to cope with them and a man who would shoot and use good judgment and watch things and if possible catch them, and after I had gone over the matter thoroughly with him he said, 'I will take the

> job' or words to that effect. * * * I explained to him that they had been robbing the cars en route—throwing the stuff out en route and they were a large gang and a bad gang. * * * I told him that all of them were armed and that all of them would shoot him on sight and that he had to be very careful.
> "Q. To be careful about what?
> A. About his own life."

David was given a pistol and a sawed-off shot gun for the purpose of defending himself and the company's property. He was also given a flashlight. With respect to its use Mr. Barber testified:

> "Well, the use of a flashlight in that business is very little, but occasionally it is very necessary. It is not necessary to examine the seals. They generally use them in order to protect their persons from hiding bandits along between the cars, but there are cases where you might find a door open and want to flash the light inside of a dark car to see what was the condition in it."

Prior to his employment as a train rider David had had some experience in police work of a special character. In 1907 he had served as a guard to protect the property of a coal company during a strike by its employes. From 1911 to 1915 he worked for the Pinkerton Detective Agency, in Kansas City; "he walked a beat for them * * * a guard sort of * * * he was armed."

At the times first mentioned, appellant maintained a departmental organization for special service. The special service performed by it was essentially police

work, having for its objective the protection of both the property of the railroad and that entrusted to it for transportation. The head of the special service organization, styled Chief Special Agent, was R. S. Mitchell. Mr. Mitchell's headquarters were in St. Louis. An assistant chief special agent, W. H. Boult, maintained headquarters in Kansas City.

About the time David entered appellant's employ one McCarthy was also employed for the special service. McCarthy was a member of the gang of thieves against whose depredations the appellant was making strenuous efforts to protect itself. With respect to the nature and terms of the employment Mr. Mitchell testified:

> "I talked with McCarthy probably two or three hours [at the Baltimore Hotel in Kansas City], at which time he told me the history of the robberies committed by this gang; he told me at that time who was acting as head of the gang, who was furnishing the brains for these thieves, and he told me a great many details in connection with these robberies; he told me that he was trailing with the gang and he wanted to get away from them. I arranged with him to keep us informed as to the activities of this gang, to give us advance information, if possible, when this gang planned to rob our trains, and further arranged with him, in the event he could not get to us, couldn't give us advance information, to give us information then as to the fence where the stuff was taken, as well as who was in the robbery, and all the details possible. Now, after I had satisfied myself that McCarthy knew what he was talking about, and I believed he could do what he contracted to do, I arranged with him to pay him

one hundred and fifty dollars a month for that sort of service, and then I called in my assistant, Mr. W. H. Boult, and I introduced Boult to McCarthy, and arranged with McCarthy his way of reporting to Mr. Boult, and left the matter in Mr. Boult's hands.

* * * * * * *

"He reported to Mr. Boult by 'phone; that was the arrangement made at that time, and if it was necessary to arrange a meeting, he was to arrange a meeting by 'phone.

"Q. He knew how to get hold of Mr. Boult?

A. Yes, night and day service.

"Q. And where he could reach Mr. Boult at any time if he might want him?

A. Yes, sir."

It was understood, however, that McCarthy was not to report an intended robbery unless he could do so without uncovering himself to the gang.

Following his employment McCarthy reported to Boult from time to time the plans and doings of the gang. On one occasion he reported that they intended robbing a train at Kenneth Tank, in Kansas [twenty-five miles out from Kansas City]. He made the report about five o'clock in the afternoon; the robbery was to take place that night. Thereupon a warning was sent out to the riders and the crew of the train, and an automobile load of special officers, with the aid of the local police, covered the place of the intended robbery during the night. The plans of the robbers miscarried, however, and they never left Kansas City, Kansas.

On May 16, 1923, one of the gang was on trial for robbery in the District Court in Kansas City.

Kansas. A number of his associates, including McCarthy, were in attendance as spectators. They were in and around the court room throughout the day. At the noon hour one of them suggested that they rob a merchandise train of defendant when it reached Leavenworth that night—the train was due there at about 1:30 in the morning. The matter was discussed by them at intervals during the afternoon, they finally agreeing to get together that evening at the house of one Riley. They met at Riley's at about 6:30 P. M. After further discussion there of the plan which had been taking form during the afternoon it was definitely agreed upon, although some of them declined to participate; having robbed this particular train at the same place several times before they were of the opinion that it was too "hot."

Pursuant to the plan just mentioned, four of the gang, Bert Gladsen, Red Loar, Lawrence Hayes and McCarthy, left Kansas City at ten o'clock that night for Leavenworth. They left in an automobile and reached Leavenworth about 11:15. They stopped at an old sugar refinery about a half block from the Missouri Pacific tracks and waited for the train—about an hour or an hour and a half.

On arriving at South Leavenworth the train took a siding to clear the main track for a passenger train and stopped.

When the train whistled at Leavenworth, Gladsen and McCarthy got out of the waiting automobile, and Loar and Hayes drove away. It was the plan that the former would break into the cars at South Leaven-

worth, get the merchandise ready and throw it out at a particular crossing previously agreed upon in the north end of the town, where the other two with the car would meet them and return with the loot to Kansas City.

On leaving the automobile Gladsen and McCarthy went over to the railroad tracks, climbed upon the train and rode down into the yards to the place where it stopped. They were both armed and McCarthy had a pinch-bar, the breaking tool.

After the train had been standing probably ten minutes, Dougherty, the conductor, and Boyd, also a train rider, left the caboose and proceeded forward between the main line and the passing track. Boyd was behind Dougherty. When they reached a point twenty-five or thirty car lengths from the engine, they heard two shots, fired close together; the place of the shooting was four or five car lengths ahead of where they were. Dougherty proceeded ahead and found David lying on the ground dead. He testified, "It appeared that he was shot [in the chest somewhere] from someone standing up and ranged downward." David fell between twenty and twenty-five car lengths from the engine, where he had been when the train stopped, and on the same side of the train where Dougherty and Boyd were walking. Dougherty did not see David when he was shot; he did not see the person who did the shooting; he saw no gun flashes; he neither saw nor heard anything to indicate the presence of box car thieves prior to the firing of the

two shots. David was armed with a revolver and a sawed-off shotgun at the time.

Gladsen was subsequently convicted of the murder of David and sentenced to life imprisonment.

McCarthy did not give to Boult or to any other officer or agent of appellant advance information of the contemplated robbery. He made no report of any kind with respect thereto until seven or eight o'clock in the morning following the occurrence in which David was killed. He then gave Boult "all the information on who killed David and how it happened." As a result of McCarthy's failure to inform Boult of the intended robbery neither the train riders, David and Boyd, nor the members of the train crew were given any warning thereof.

Appellant contends that McCarthy had no opportunity for communicating with Boult over the telephone prior to the happening of the event without uncovering himself as an informer. The evidence, however, abundantly justifies a finding to the contrary. It shows that for reasons of his own McCarthy absented himself from the members of the gang for a brief interval two or three time during the evening prior to the departure for Leavenworth. It further shows that there were many other occasions during the same period when, on one pretext or another, he could have left them for a sufficient length of time to have gotten into communication with Boult's office—unless he was under suspicion, and that is not remotely suggested by the record.

McCarthy's employment was kept a secret; only the heads of the special service department were supposed to know it. Presumably David had at no time any knowledge of the company's efforts to secure advance information of intended robberies.

The cause was submitted to the jury on the following assignment of negligence: "that said defendant through its agents and employees knew of said contemplated robbery in time, by the exercise of ordinary care, * * * to have warned said James Lee David of said proposed robbery so that said James Lee David could have protected himself, but said defendant negligently and carelessly failed so to do, and as a result thereof said James Lee David was shot and killed as aforesaid."

I.

It is contended by appellant that, even though it had advance information that a gang of armed thieves and robbers were intending to loot one of its trains at South Leavenworth in the early morning of May 17, and, therefore, knew the specific perils that would be encountered at said time and place by its train rider, David, it was under no duty to impart such information to him, and for that reason it was not negligent in failing to do so. The contention is stated at length by counsel as follows:

> "The deceased, James Lee David, having been employed by the defendant for the express purpose of protecting defendant's trains from car thieves and train robbers, and having been fully warned that robberies of such trains as he was

guarding and riding were likely to occur at any time and place and that the car thieves were desperate characters who were likely to take his life in attempts to frustrate such robberies and in the protection of said property by him, and having been fully instructed to arm himself, as he did arm himself, with a loaded revolver and loaded sawed-off shotgun; and said David having accepted employment with knowledge of such probable activities of said train robbers and of the dangers to himself in coping with them, he voluntarily assumed the risks of such employment, and the shooting of David by Gladsen was incident to David's service and was one of the risks assumed by him. This was one of the risks and perils ordinarily incident to this employment. * * * No duty, therefore, rested on his employer to obtain and give David notice of this particular intended train robbery."

The facts of this case, as the basis of an action for personal injury or death, are unusual. The question of whether they constitute a sufficient predicate for the charge of negligence may, nevertheless, be resolved upon principles which are familiar. Assumption of risk arises out of the contract of employment, the obligations of which are mutual. The servant on the one hand impliedly agrees to assume the risk of all dangers and perils ordinarily incident to the work undertaken by him; the master on the other hand impliedly contracts that he will at all times do whatever may be needful to minimize or obviate such risks, in so far as the same may be done by the exercise of ordinary care. It is axiomatic that, *prima facie*, a servant does not assume any risks which may be obviated by the

exercise of reasonable care on the master's part [3 Labatt's Master & Servant (2d Ed.), §894].

> "One, and perhaps the most important, of those exceptions (to the doctrine of assumption of risk), arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require * * *" [*Hough* v. *Railroad*, 100 U. S. 213, 217].
>
> "It is those risks alone which can not be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes" [*Pantzar* v. *Mining Co.*, 99 N. Y. 368, 376; see also Labatt, *supra*, §1178 and cases cited in the notes].

Although David knew, appreciated and assumed the dangers incident to his employment, it was, notwithstanding, the continuing duty of his employer to exercise ordinary care to minimize or obviate them. That a timely warning to David, giving him the information which appellant had acquired in advance of the intended robbery, subsequently attempted, would have greatly minimized, if not obviated, its perils to him, is so obvious as to require no elaboration. In its failure to give such warning, appellant was derelict in the discharge of a duty both moral and legal.

If the jury's finding in this case is warranted by the evidence, appellant's negligence, and not the as-

sumed risks incident to his employment, was juridically speaking the proximate cause of David's death.

II.

Appellant's next contention is that, even though its failure to warn David be deemed negligence, the evidence was not sufficient to justify a finding that such negligence proximately caused his death. This causal connection, it is true, must be proved by the evidence, as a fact, and not be left to mere speculation and conjecture. The rule, however, does not require that there must be direct proof of the fact itself. This would often be impossible. It is sufficient if the facts proved are of such a nature, and are so connected and related to each other, that the conclusion therefrom may be fairly inferred [*Settle* v. *Railroad*, 127 Mo. 336, 341, 30 S. W. 125].

The evidence is lacking somewhat in detail as to the shooting of David. Only two persons, perhaps, could have circumstantially described the occurrence; McCarthy, whose whereabouts at the time of the trial were apparently unknown, and Gladsen, who was serving a life sentence for the murder in the Kansas penitentiary at Lansing. The latter's deposition was taken and read in evidence, but he was not interrogated as to the fatal shooting. Notwithstanding, there are sufficient facts in evidence to induce the belief that David unsuspectingly walked into a veritable death trap.

When the train came to a stop in the yards at South Leavenworth, David presumably left the cab

of the engine where he had been riding and started walking toward the rear of the train, examining the seals on the box cars as he went. The flashlight which he carried was not necessary for that purpose and was not used by him. When he had gotten a distance of twenty or twenty-five car lengths from the engine, two shots, fired in close succession, suddenly rang out, and he fell to the ground alongside the train, dying instantly. Dougherty, the conductor, who had left the caboose and was walking forward on the same side of the train, neither saw nor heard anything that attracted his attention until the two shots were fired; at that time he was but four or five car lengths from where David fell; he did not see David when he was shot; he did not see anyone do the shooting; he saw no flash from the firearm; and he saw no one running away from the scene of the shooting. Manifestly, the assassin was hiding between the cars, he fired at David the moment he came in range and then made his escape from the opposite side of the train. Whether Gladsen, who was there for the purpose of breaking into the box cars and stealing the contents, was impelled by fear of detection to shoot David, or otherwise, is a matter of conjecture. Notwithstanding, the outward setting is perfectly plain; David unwittingly walked into deadly peril and thereby lost his life.

Appellant argues that as David had been warned specifically and fully with regard to the activities of the gang of thieves, of their dangerous character and of the likelihood of their attempting to shoot and kill

him in case he came in contact with them, it can not be reasonably inferred that he would have been any more alert or would have taken any greater precaution for his own safety, on the occasion of the attempted robbery at Leavenworth, had he been forewarned with respect to it. The argument overlooks the fact that the dangers generally incident to David's work, like those of any policeman who walks a beat at night, were merely contingent and in a sense remote. Foreknowledge that a specific danger will arise at a definite time and place will bring about quite a different reaction on the part of a policeman or any other. In addition to quickening the perception of the danger, such knowledge makes possible the adoption of adequate measures to meet or avoid it. From the characteristics of the thieves and their methods of operating, it is quite clear that they never courted an open battle with train guards; they merely shot their way out of trouble. If David had known of their presence when he left the engine cab, he would also have known that it was not only possible, but highly probable, that some of them were lurking between the box cars. With that knowledge it is inconceivable that he would have exposed himself to the particular peril which cost him his life. To say that he might have been killed anyway, even if he had been forwarned that the thieves would be there and had consequently followed a different course for the purpose of warding them off and protecting the company's property, is to leave the evidence for an excursion into the field of conjecture. From the evidence it

may be justly inferred that David's death resulted from appellant's failure to warn.

What has been said disposes of all the questions raised and presented for determination. The judgment of the Circuit Court is affirmed. All concur.

WILLIAM T. RAGLAND, J.

[fols. 233-238] Motion for rehearing, covering five pages, filed July 2, 1931, omitted from this print. It was denied and nothing more by order of July 28, 1931.

[fol. 244] Motion to transfer cause to Court *in banc* covering one page, filed July 2, 1931, omitted from this print. It was denied and nothing more by order of July 28, 1931.

[fol. 246] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SEP 8
CHARLES E...

No. 365

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, AND BRIEF IN SUPPORT THEREOF.

EDWARD J. WHITE,
of St. Louis, Mo.,
THOMAS HACKNEY and
LESLIE A. WELCH,
of Kansas City, Mo.,
Counsel for Petitioner.

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VS.

SOPHIA DAVID, ADMINISTRATRIX OF THE ESTATE OF JAMES LEE DAVID, DECEASED, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Missouri Pacific Railroad Company, a corporation, respectfully petitions this Honorable Court to grant its Writ of Certiorari to the Supreme Court of the State of Missouri, and to remove therefrom to this court for review the record in the cause there lately pending entitled *Sophia David, Ad-*

ministratrix of the Estate of James Lee David, Deceased, Respondent v. *Missouri Pacific Railroad Company, Appellant,* being No. 29,330 on the docket of that court, the petitioner herein being the appellant therein.

The judgment of the Supreme Court of Missouri rendered on June 24, 1931 (R. 219), which affirmed the judgment of the trial court, became final on the denial of appellant's motion for rehearing and motion to transfer to court *en banc* on July 28, 1931 (R. 234).

A duly certified copy of the entire record of said cause is herewith presented.

QUESTIONS PRESENTED.

The questions involved in this petition for certiorari are these:

1. Whether in an action under the Federal Employers Liability Act against petitioner, an interstate carrier, brought by the legal representatives of a deceased employee, David, an armed train rider who was shot and killed by a train robber while the deceased and another train rider were protecting an interstate train from theft of merchandise thereon, the petitioner was liable for the death of the said deceased on account of not having warned him of that particular intended train robbery. Or, whether the risk of such injury had been assumed by the deceased, an experienced train rider and guard who had been warned of the activities and dangerous character of a gang of train robbers on petitioner's trains, and of the likelihood that train robberies would occur at any time and place, and had been instructed to keep constantly on the alert and

to shoot to kill if necessary to protect himself from injury, and had been furnished a loaded automatic revolver and a sawed-off shot gun, loaded with buckshot and had agreed at the time of his employment to cope with such train robbers and was thus armed at the time of his fatal injury.

2. Whether the applicable law of assumed risk was correctly declared by the Missouri Supreme Court in its opinion (R. 230) thus:

> "Although David knew, appreciated and assumed the dangers incident to his employment, it was notwithstanding the continuing duty of his employer to exercise ordinary care to minimize or obviate them."

3. Whether one McCarthy, a known member of an active gang of train robbers and car thieves who, for an agreed compensation, to be paid him by petitioner, secretly agreed to furnish petitioner's Assistant Special Agent Boullt with such advance information as he, McCarthy, by continuing to consort with them, might obtain of this gang's intended robberies of trains of petitioner whenever he could do so with safety and without uncovering himself to his gang—he, McCarthy, to employ his own means, methods and time in obtaining and using this information, all without control of petitioner—was an independent contractor for whose acts or omissions petitioner was not liable. Or whether said McCarthy thereby became the agent or servant of petitioner, so that his uncommunicated knowledge of an intended train robbery was imputed to petitioner and a duty thereby cast upon petitioner of

warning David of the particular time and place when this intended train robbery would occur.

4. Whether said McCarthy, if deemed the agent or servant of petitioner, was the sole judge of whether he could or could not with safety and without uncovering himself, telephone petitioner's special agent, Boullt, and advise him of this intended robbery. If not, then whether the evidence was sufficient to prove that McCarthy was negligent in not so advising said Boullt.

5. Whether the secret efforts of petitioner to obtain from McCarthy advance information of intended train robberies, all done without David's knowledge, and without promise to furnish him such information, rendered the furnishing of such information to David a duty on petitioner's part.

6. Whether, if petitioner was charged with the knowledge which McCarthy had of the intended train robbery, though uncommunicated to petitioner, the failure of petitioner to warn David of the time and place the particular, intended robbery was to be attempted, was, under the evidence, the proximate cause of his death.

7. Whether the evidence was sufficient to show any negligence on the part of petitioner in discharging the duty which it owed to David.

The petitioner claims that the evidence is not sufficient to support the finding of negligence on its part, and that the verdict of the jury and the judgment below are based on erroneous theories of liability and are the result of speculation and conjecture.

The Supreme Court of Missouri, in its opinion (R. 219-234) not yet reported, held that the evidence was sufficient to establish the negligence of petitioner, and that such negligence was the proximate cause of David's death.

The question as to the sufficiency of the evidence to support the verdict and judgment in question, the action being based on the Federal Employer's Liability Act (U. S. C., Tit. 45, Sec. 51), where both the carrier and its employe, at the time of the fatal injury, were concededly engaged in interstate commerce, is therefore clearly a federal question and within the jurisdiction of this court on certiorari.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Coogan*, 271 U. S. 472, 474 and cases cited.
St. L.-S. F. Ry. Co. v. *Mills*, 271 U. S., 344, 346.

NATURE OF ACTION.

This is an action brought under the Federal Employer's Liability Act (U. S. C. Tit. 45, Sec. 51), for damages on account of the fatal shooting, by a train robber, of James Lee David, a train rider for the petitioner, while the deceased was protecting and guarding an interstate train at Leavenworth, Kansas, on May 17, 1923. The respondent is his widow and the administratrix of his estate.

The suit was instituted and tried in the Circuit Court of Jackson County, Missouri. On the trial before a jury respondent recovered a verdict and judgment for $15,000.00 (R. 1.), whereupon, after unsuccessful motions for new trial and in arrest of judg-